No. 923

APR 5 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

HENRY V. McGURREN,

Petitioner,

vs.

GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SOELKE,
Counsel for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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HENRY V. McGURREN,

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vs.

GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Henry V. McGurren, a resident of the State of Illinois, respectfully shows that on December 27, 1940 (rehearing denied March 3rd, 1941), the United States Circuit Court of Appeals for the Seventh Circuit affirmed a judgment entered by the District Court of the United States for the Northern District of Illinois upon a jury verdict rendered after a trial before the Honorable Philip L. Sullivan, District Judge, said judgment having been entered on the 7th day of February, 1940, in favor of

Gladys McVeigh in her own proper person (hereinafter referred to as plaintiff-sole), in the sum of $4,000 and in favor of Gladys McVeigh as guardian of the persons and estates of Thomas McConnell and Charles Dewey McConnell, minors (hereinafter referred to as plaintiff-guardian) in the sum of $8,500, being the respondents herein, the court having entered judgment against Henry V. McGurren, Defendant, the Petitioner herein, in the sum of $12,500.

Summary and short statement of the matter involved.

This action was brought by two plaintiffs, plaintiff-sole and plaintiff-guardian (said plaintiffs being so referred to in the proceedings before the Circuit Court of Appeals), each respectively, to recover special and general damages suffered by plaintiff-sole and by plaintiff-guardian, and each of them, and also to recover punitive damages allegedly occasioned by affirmative, false, and fraudulent representations allegedly made by the Defendant, pursuant to which Plaintiff, Gladys McVeigh, alleges she signed, on March 18, 1935, a document hereinafter designated as RELEASE (Tr. 92), whereby she effectively released all sums due her as plaintiff-sole and also all sums due or that might become due said Thomas McConnell, Jr. and said Charles Dewey McConnell, minors, from their father, Thomas McConnell, pursuant to a property settlement agreement (hereinafter designated as AGREEMENT, Tr. 77, 79) which prior thereto had been incorporated in and approved by a decree of divorce granted plaintiff-sole by a California court, which aforesaid damages she sought to recover for them as their guardian.

Plaintiff alleged that in and by said AGREEMENT (Pltf's Ex. 1, Tr. 77, 79 to 85) said McConnell was to pay plaintiff

individually, $150 a month for her own support until she remarried and was also to pay her the sum of $100 a month for the support of the two children of the parties during their minority, they then being of the ages of six and one-half and four and one-half years respectively;

That the Superior Court of Los Angeles County, California, had entered interlocutory and final judgments of divorce (Pltf's Ex. 1, Tr. 77, 78 and 79) which in substance incorporated said AGREEMENT and approved the same; that there became due to plaintiff-sole, under said AGREEMENT, for her own support and for the support of the two minor children the sum of $16,887.54 plus an obligation of McConnell to pay $8,608.03 for future support of said children; that a few days prior to the execution of said RELEASE the Defendant, as executor of the Estate of John M. Grace, deceased, distributed to said McConnell a large amount of money and property and that shortly after said distribution of said funds by the Defendant to said McConnell the Defendant, intending to fraudulently obtain a release from Plaintiff of the kind and character above set forth, falsely represented to Plaintiff at Los Angeles, California, that said McConnell was without any money, funds, or property with which to meet his obligations to Plaintiff and that he had been able to borrow the sum of $1250 which Defendant was authorized to pay Plaintiff for the signing of the said RELEASE; and that Plaintiff executed said RELEASE, believing the said representations of Defendant and relying on the same; and that after the death of McConnell on June 8, 1936, and the probating of his estate in the Probate Court of Cook County, Illinois, she for the first time learned that McConnell had much of the property that was delivered to him by Defendant

McGurren as executor of the estate of John M. Grace, deceased, at the time that she executed said RELEASE and that said RELEASE was therefore obtained by false and fraudulent representations of Defendant.

Plaintiff further alleged that she filed a claim against the said estate of McConnell (Pltf's Ex. 5, Tr. 152 to 154) in her own behalf and as guardian of the persons and estates of the said minor children, in the sum of $25,000, and that at a hearing thereon in the Probate Court of Cook County the Defendant herein, as attorney for said estate, interposed the said RELEASE of March, 1935, as a defense to said claim, and that said claim was disallowed in said Probate Court (Pltf's Ex. 6, Tr. 156, 157) solely upon the basis of said RELEASE and for no other reason whatsoever (Tr. 19, 20, 30); that Plaintiff was compelled to sue the Estate of McConnell in the Superior Court of Cook County to obtain cancellation of said RELEASE for fraud and to incur expenses in that behalf, demanding special damages of $10,000 and general and punitive damages of $35,000.

Defendant in his Answer to Plaintiff's complaint in this proceeding denied all of the material allegations of the complaint except such allegations as pleaded the record of the divorce proceedings in California and the proceedings in the Probate and Superior Courts of Cook County and the execution of the RELEASE and alleged that the amounts due under the AGREEMENT were payable to the Plaintiff individually and in no other capacity (Tr. 32), and that the AGREEMENT was entered into between the Plaintiff and McConnell in the light of certain statutory provisions of the State of California, as follows (Tr. 33, 34):

> "OBLIGATION OF PARENTS FOR THE SUPPORT AND EDUCATION OF THEIR CHILDREN.—The parent entitled to the custody of a child must give him support and edu-

cation suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability." (Deering's Civil Code of Calif., 1931, Sec. 196, Chap. 3.)

"HUSBAND AND WIFE. PROPERTY RELATIONS.—A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during such separation." (Deering's Civil Code of Calif., Sec. 159, Chap. 3.)

"WHEN A PARENT IS NOT LIABLE FOR SUPPORT FURNISHED HIS CHILD.—A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause." (Deering's Civil Code of Calif., Sec. 208, Chap. 3.)

And further alleged that but for the provisions of said AGREEMENT obligating McConnell to pay to the Plaintiff the sums provided therein, the law would have cast upon the Plaintiff the duty of supporting said two minor children, and that the obligation contained in said AGREEMENT to pay to Plaintiff the sums therein mentioned for the support of said minor children was a single and sole contract of McConnell with the Plaintiff individually; that said two minor children had no right or claim against their father thereunder that they could enforce against him other than the right of support as is provided by Section 196 of the Civil Code of California, and that the provisions of said AGREEMENT were for the sole benefit and protection of the Plaintiff-sole and not for the purpose of creating any right, interest or claim in or for said children against their father. (Tr. 35.) The answer further demanded full proof that McConnell failed to make the payments under the said AGREEMENT. (Tr. 40.)

The Defendant further alleged that the $1250, which was the consideration for the RELEASE, was paid to the Plaintiff-sole, and not paid to her in any representative capacity and not for the purpose of securing a release of any of the rights of the minor children. (Tr. 40.) As to the hearing in the Probate Court, the Defendant alleged that the claim of the Plaintiff was denied after consideration of all of the evidence presented upon the hearing, and that it does not appear from the record of said court that the RELEASE was held as a bar to Plaintiff's claim. (Tr. 70-72.)

Defendant in paragraph 15 of his answer (Tr. 49) further alleged that the decree entered in the above mentioned Superior Court case referred to in Plaintiff's Amended Complaint (Tr. 20), provided, among other things, as follows (Tr. 55):

> "That no false or fraudulent representations were made by the said Henry V. McGurren to the said Gladys McVeigh to secure her release of the sum of Nine Thousand Dollars ($9,000.00) due and owing to her as alimony for her own support and maintenance from March 20, 1928, until April 7, 1933, the date of her remarriage; and that for and in consideration of the sum of One Thousand Two Hundred Fifty Dollars ($1,250.00) she finally and effectively released Thomas F. McConnell from any and all claims which she had for alimony and her individual support and maintenance under and by virtue of the said Decree and Judgment of Divorce and the contract included as part thereof. That it was not necessary to submit the said release to the Superior Court of California for its approval insofar as the same related to her individual support and alimony";

which said paragraph of Defendant's answer was stricken by the trial court (Tr. 68, 70).

Defendant further in his answer denied that Plaintiff filed a claim in the Probate Court of Cook County in the

estate of Thomas McConnell, deceased, in any representative capacity, as guardian or otherwise, for and on behalf of said children (Tr. 42); and denied that Plaintiff's claim filed in her individual capacity in the said Probate Court was disallowed solely by reason of said release being held as a bar thereto (which defense the trial court struck from Defendant's answer on motion of plaintiff (Tr. 63, 70), and thereafter Defendant filed an amended paragraph 13 in which he admitted that Plaintiff filed a claim in the Probate Court in her individual capacity in the sum of $21,674.23 against the Estate of Thomas McConnell, deceased, but denied that she filed any claim in any representative capacity on behalf of said two minor children, as their guardian or otherwise (Tr. 70, 71), and also denied (Par. 2, Tr. 71) that the Probate Court held that the release in question was a bar to Plaintiff's claim set forth in the Amended Complaint filed herein and denied that the defendant, as attorney for the administratrix of the Estate of McConnell, deceased, interposed said alleged RELEASE as a defense in bar to the claim of the plaintiff as set forth in said Amended Complaint (Tr. 71, 72).

Petitioner at this point believes it is desirable to call attention of the Court to the fact that on motion of the Plaintiff certain other paragraphs of Defendant's Answer to Plaintiff's Amended Complaint were stricken, as follows:

Paragraph 13 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant pleaded the defenses raised by the Administratrix of the Estate of McConnell to the allowance of Plaintiff's claim in the Probate Court of Cook County in denial of the implication contained in the allegation of Plaintiff that her claim in the Probate Court was disallowed solely because of the

interposition of the release in question (Tr. 42 to 48), without the presentation of any other objections or defenses.

Paragraph 16 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant pleaded that if said release does in fact release said McConnell from the payment of any alleged amounts due or to become due under said property settlement agreement or judgment of divorce incorporating the same for the support and maintenance of Plaintiff's two minor children, then said alleged amounts became due or would become due pursuant to the incorporation of said property settlement agreement in said judgment of divorce, because said property settlement agreement thereby became merged in said judgment of divorce, which judgment remains unsatisfied, that said release was never submitted for approval to the divorce tribunal which entered said judgment of divorce, and that, as a matter of law and also of fact Gladys McVeigh was without legal capacity or authority or right to execute the release in question (Tr. 56, 57).

Paragraph 17 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant alleged that if any sums became due under said property settlement agreement or under the decree of divorce to Gladys McVeigh as trustee or guardian of her two minor children that said release was contrary to public policy of the States of California and Illinois and was illegal and void *ab initio* and could not be pleaded as a bar to any action of the Plaintiff predicated on either the property settlement agreement or the judgments of divorce in which it was merged (Tr. 57, 58).

Paragraph 18 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant set forth

that there were two children born to Thomas McConnell as a result of a second marriage, one of them being a posthumous child, both of whom were living in and resident of the State of Illinois, that to allow the claim of the wards of Plaintiff-guardian, children of the first marriage, would render the two children of the second marriage, resident of Illinois, penniless and without maintenance, that the agreement which had become merged in the decree of divorce was simply a provision for the maintenance of said children predicated on the usual common law duty of a parent to take care of his children and nothing more, and that to enforce said claim ot plaintiff-guardian's wards for the full amount against the estate of McConnell would be contrary to public policy of the State of Illinois in reference to the administration of the estates of decedents, which recognizes the doctrine of equality of distribution among all the children of a decedent (Tr. 58).

Paragraph 19 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant set forth the decree of the Superior Court of Cook County to the effect that the Court, after considering the issues, found that the minor children of Plaintiff in that suit (being the wards of Plaintiff-guardian herein) were entitled to the sum of $8,000 under the property settlement agreement as incorporated in the decrees of divorce, that the release was invalid as to said minor children as it was not approved by the Superior Court of Los Angeles County, which had jurisdiction of said divorce proceedings, and that said amount of $8,000 should be paid out of the Estate of Thomas McConnell, deceased, in due course of administration (Tr. 59, 60).

We have not attempted to specifically refer to all the divers motions made by the parties in respect to the

pleadings, believing that the reference in our argument to certain parts of said motions will be sufficient without the necessity of burdening the court with a consideration of the same at this time.

We have refrained from attempting to review all of the evidence in this case. However, it does appear that the Plaintiff testified to two conferences, one at the Hollywood Hotel, Los Angeles, which she first said took place on March 13th, changing the date, on cross-examination to March 15th (Tr. 86, 104), and which the defendant says took place on March 13th (Tr. 205), at which only she and the Defendant were present. He denies that he made each and all of the deceitful representations attributed to him. Defendant then testifies that there was a further conference on March 15th at the Prosecutor's office with the Plaintiff, and he is corroborated in his testimony that such conference took place by the witnesses Oakley and Peters (Arlene Evans Peters) (Tr. 258, 282), and Defendant testifies that at that conference he told the Plaintiff that he would have to find out whether or not McConnell would pay more money for a settlement than he was authorized to offer her, and they agreed to meet for a further conference at the Prosecutor's office at a future date (Tr. 209) and did meet on March 18th (Tr. 211). The plaintiff absolutely denied under oath that the conference of March 15th took place (Tr. 125, 126). Both Plaintiff and Defendant testified there was a conference at the Prosecutor's office on March 18th (Tr. 89), at which time the Plaintiff reiterates that the Defendant again made the alleged affirmative, fraudulent, deceitful representations (Tr. 91), and Attorney Ham, who was at that conference to advise her, in part corroborated her testimony (Tr. 136). Defendant denies that he made the alleged

affirmative, fraudulent, deceitful representations attributed to him at the Prosecutor's office (Tr. 215) and the effect of the testimony of the witnesses Oakley and Peters (Arlene Evans Peters) is to corroborate him (Tr. 258, 286). The Release was executed at the conference on March 18th (Tr. 91).

Special damages having been specifically waived by the Plaintiff (Tr. 301), and while the jury were instructed as to punitive damages (Tr. 374), their verdict of $4,000 for plaintiff-sole and $8,500 for plaintiff-guardian clearly was limited to general damages (Tr. 376). The verdict was arrived at upon the following instruction of the court as to general damages (Instruction 20, Tr. 374), and expresses the theory on which Plaintiff's case was tried (Tr. 183-302), and was not challenged by the Defendant.

> "The matter of general damages, without any intention to convey to the jury any facts in issue in this case that the general damage is recoverable in a case of this kind, are the difference between the fair and reasonable value at the *time* and *place* in question of the claim or right *surrendered, cancelled,* or *released,* by the plaintiff under the *terms* of the *release* in evidence, and the amount paid her under the evidence at the time of the execution of such release." (Italics ours.)

Jurisdictional Statement.

The jurisdiction of this court is based upon Section 240 A of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA, Par. 347A), and rule 38 of the Revised Rules adopted February 13, 1939, and this petition is presented within three months of the date of the denial of petition for re-hearing in the United States Circuit Court of Appeals, namely, March 3, 1941.

Questions Presented

(a) The case having been tried and submitted to the jury upon a measure of damages assented to by both the Plaintiff and the Defendant, and adopted by the court in its charge to the jury, can the Circuit Court of Appeals justify the verdict on an entirely different measure of damages upon which the jury were not instructed?

(b) Were the findings and orders of the decree entered in the Superior Court of Cook County, to the effect that this defendant was not guilty of the fraudulent representations attributed to him; that the release in question did not affect the rights of the minors, wards of plaintiff-guardian, under the divorce decrees; and that the said minors and wards were entitled to $8,000 out of the estate of McConnell, deceased, predicated on their rights under the divorce decrees, all properly pleadable and material evidence in this cause?

(c) Can the Circuit Court of Appeals disregard the settled law of the State of Illinois with respect to the statutory proof and evidence required for the allowance of claims against estates of decedents in proceedings in the Probate Court?

(d) Was the ruling of the Court of Appeals to the effect that it is only necessary for a plaintiff in a case of this kind to establish the gravamen of the action by a preponderance of the evidence and that an instruction to that effect was proper rather than by a clear preponderance of the evidence contrary to and in conflict with applicable local decisions and therefore error?

Reasons relied on for writ.

I.

The decision of the Circuit Court of Appeals to the effect that the validity of the release was immaterial amounts to the establishment, as a principle of law, by that Court, that it is not bound, in reviewing the case, by the theory upon which Plaintiff tried her case, which was also assented to by the Defendant, and pursuant to which the Court gave instructions to the jury to the effect that the measure of damages is the difference between the value of what plaintiff received under the release and the value of the thing released, which instruction could be predicated only on the theory that the release was valid and binding upon one or both of the plaintiffs; and in this respect the opinion of the Circuit Court of Appeals in this case is inconsistent with the decision of Circuit Courts of Appeal of other circuits and is also in conflict with applicable local decisions.

II.

The decision of the Circuit Court of Appeals is predicated upon the theory of law that a decision in the State court cannot be pleaded as *res judicata* or estoppel and is not binding upon the plaintiff instituting the proceeding in the State court in another case, unless the party in the second suit making such plea, was a party to said State court suit and unless there was mutuality; thereby making a decision directly contrary to decisions of other Circuit Courts of Appeals that mutuality is not necessary in order that a plea of estoppel or *res judicata* may be effective by reason of the finding of facts in another court in a

prior suit adverse to the plaintiff, even though there was not mutuality and though the party pleading the estoppel or *res judicata* was in no way a party to or in privity with the parties to the other suit.

III.

The opinion of the Circuit Court of Appeals that the findings of fact of the Superior Court of Cook County to the effect that McGurren had not been guilty of the deceitful acts attributed to him in that case (being the same identical acts complained of in this case) could not be pleaded as *res judicata* or estoppel in this case, is contrary to the law of the State of Illinois, which has adhered to the principle that in cases of *respondeat superior,* if it has been found in a prior suit that the actor-agent, whose action it was necessary to find was negligent or tortious in order to hold the principal, was not guilty; or, if in a prior suit against the agent it has been found that the agent was not guilty of the negligent and tortious acts attributed to him which it is necessary to establish and prove to hold the principal in an action against the principal; then and in that case, irrespective of whether the suit was against the principal in the first instances and against the actor-agent in the second instance, or whether it was in the first instance against the actor-agent and in the second instance against the principal, either the principal-defendant or the actor-agent-defendant may plead in a subsequent suit the finding of fact that said actor-agent was not guilty of the tortious acts attributed to him.

IV.

The finding of the Circuit Court of Appeals that there was no error committed by the trial court in striking that portion of defendant's answer which set up that the

plaintiff-guardian had obtained a judgment in the Superior Court of Cook County in favor of her wards, in the sum of $8,000, was tantamount to finding that the defendant could not plead such judgment as an estoppel or *res judicata,* predicated on the theory that the defendant was not a party to said suit and there was no mutuality, and is contrary to the decisions on that point of other Circuit Courts of Appeal.

V.

The decision of the Circuit Court of Appeals was contrary to the clear and fair deductions as to what is the law of the State of Illinois in respect to *res judicata* and estoppel, even though it may not appear that the doctrine of *respondeat superior* was involved, but predicated on the same theory which permits a prior judgment to be pleaded as *res judicata* or estoppel in cases of *respondeat superior,* for each of those cases is predicated on the theory that the principal or agent, who is the tort feasor, must have been found guilty in order to hold the superior or master and that is a principle of law not predicated on the theory of *respondeat superior* or agent and servant necessarily, but on the theory that in a case where a plaintiff has contended that he is entitled to relief predicated on certain definite acts and it has been found that he is not entitled to relief predicated on those acts because the person charged with those acts did not perpetrate the same, then it is an established principle that such adjudication can be pleaded as *res judicata* or estoppel in any other proceedings started by the same plaintiff where, in order to recover, it is necessary to establish that the party to whom said acts were attributed, being the same acts, was guilty of those acts.

VI.

The ruling of the Circuit Court of Appeals disregards the settled law of the State of Illinois with respect to the proof necessary for the allowance of claims against estates of decedents in proceedings in Probate in the State of Illinois and is therefore in conflict with applicable local decisions.

VII.

The ruling of the Circuit Court of Appeals to the effect that it is necessary for the plaintiff, in an action for fraud, to prove all the elements of the fraud by only a mere preponderance of the evidence, rather than by a clear preponderance of the evidence, is contrary to and in conflict with applicable local decisions.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court the transcript of record and all proceedings in said Circuit Court of Appeals in the cause entitled "*Gladys McVeigh, in her own proper person and as Guardian of the persons and estates of Thomas McConnell and Charles Dewey McConnell, Minors, Plaintiff-Appellee* v. *Henry V. McGurren, Defendant-Appellant,* No. 7308", to the end that said cause may be reviewed and determined by this Court as provided by law; and that your Petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper, and that said judgment in said cause may be reversed by this Honorable Court.

HENRY V. MCGURREN,

By CHARLES H. SOELKE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in full in the record at page 432 and is reported in 117 Fed. (2nd) 672.

II.

JURISDICTION.

The jurisdictional statement will be found in the petition for the writ of certiorari at page 11 and is incorporated herein by reference.

III.

STATEMENT OF THE CASE.

The statement of the case, so far as is material to the questions here presented, will be found in the petition for the writ of certiorari under "Summary Statement of the Matter Involved," page 2, which is hereby incorporated herein by reference.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court.
2. In that it determined in effect that an instruction

that mere preponderance of the evidence was sufficient rather than a clear preponderance of the evidence.

3. In that it found that the Defendant could not plead and show that part of the decree entered in the Superior Court case which held that he had not been guilty of the same affirmative, deceitful acts and representations attributed to him in this case.

4. In holding that the Defendant could not plead and show in this case that the court in the Superior Court case held that the wards of Plaintiff-guardian were entitled to receive $8,000 out of the estate of McConnell and directed that the same be paid in due course of administration by the administratrix of his estate pending in the Probate Court of Cook County, said administratrix being a party defendant to the Superior Court case.

5. In holding that the Defendant could not plead and show in this case that in and by the decree entered in the Superior Court case the court found said Release was invalid and without any effect as to the rights of Plaintiff-guardian's wards by reason of the fact that the Release had not been approved and received the sanction of the Superior Court of Los Angeles which entered the decree of divorce which approved and incorporated the Property Settlement Agreement.

6. In that its opinion was tantamount to finding that the Defendant could not plead or show any of the matters or things that transpired in the Probate Court of Cook County in connection with the alleged claim filed by the Plaintiff in the Probate Court of Cook County.

7. In that it sustained the trial court in overruling the objections of the Defendant to certain instructions given by the Court and in refusing to give certain instructions requested by the Defendant.

8. In that the court found that the question of the legality or invalidity of the Release was immaterial.

9. In sustaining the ruling of the trial court in striking from the Defendant's Answer the written objections filed by the administratrix of the McConnell estate to the Plaintiff's claim in the Probate Court of Cook County and the ruling of the trial court denying the right to the Defendant to introduce in evidence certain objections filed to said claim.

10. In sustaining the ruling of the District Court, denying the Defendant's motion for a directed verdict on the grounds that the children were not injured by the Release for the reason the mother had no authority to release their rights; that as guardian, she could not release the claims and that all rights under the Agreement were merged in the decrees of divorce, any discharge of which would require approval by the court.

11. For the reason that the opinion of the court is tantamount to holding that the financial condition of McConnell between the date of the signing of the Property Settlement Agreement and his death was immaterial.

12. In that it arrived at an erroneous conclusion when it indicated in its opinion that the Defendant was complaining of the charge which was given at the request of the Defendant, said charge being as follows:

> As a matter of law, a guardian has no right to surrender, release, or cancel the claim of this ward or any of its wards against another person, for any sum of money whatsoever, without first the consent thereto of the court of jurisdiction over such guardian of said minors, and any release executed by such guardian of said minors without such consent is wholly void and invalid as a matter of law. (Par. 4, Tr. 369.)

instead of finding that the trial court had erred in sus-

taining the Plaintiff's motion to strike the portions of the Defendant's Answer contending that the Release was wholly void and of no legal effect, which said ruling of the trial court was erroneous and inconsistent with the proper theory of law set forth in the instruction.

13. In denying the Defendant's motion at the close of all the evidence to direct a verdict finding the Defendant not guilty.

14. In denying the Defendant's motion made subsequent to the jury's verdict for a new trial and for a directed verdict.

15. In denying the Defendant's motion for arrest of judgment.

16. In not recognizing and applying to this case the principle of law that where there are no exceptions as to a statement as to the law in the charge given to a jury by the trial court that such statement becomes the law of the case for purposes of appeal and the reviewing court must be governed thereby no exceptions having been taken by the parties to the case.

SUMMARY OF THE ARGUMENT.

I.

Plaintiff set up in her pleadings that she had filed a suit in the Superior Court of Cook County to have the release in question declared null and void, because of the fraud and deceit of this Defendant in procuring the same. The Superior Court found that the Defendant had not been guilty of the fraud and deceit attributed to him, being the same fraud and deceit attributed to him in this case, and found that the release in question was valid as to plaintiff as an individual but invalid as to the two minor children, wards of plaintiff-guardian herein, as it was not approved by the Superior Court of Los Angeles County, California, which entered the divorce decree and had jurisdiction of said children, and also found and decreed that out of the Estate of McConnell, pending in the Probate Court of Illinois, there should be paid to the children as the value of their claim under the property settlement agreement, the sum of $8,000. The trial court struck from Defendant's Answer all pleadings in reference to said findings of the Superior Court of Cook County and in the appeal to the Circuit Court of Appeals the Defendant assigned error thereon. The Circuit Court of Appeals sustained the rulings of the trial court and Defendant contends that said Court of Appeals should have reversed the trial court's rulings in that respect on the theory of *res judicata* and estoppel and on the theory that the plaintiff having obtained a judgment of $8,000 in favor of her two wards in the said Superior Court case, Defendant was entitled to plead that in this pro-

ceeding, even if it could be contended that the said children had suffered damage by reason of the release.

II.

The contention of Plaintiff throughout this litigation has been that by reason of alleged affirmative, deceitful representations of this Defendant she executed a release as a consequence of which she and her two wards suffered damages consisting of the loss of certain monthly payments provided to be made to them under the terms of a property settlement agreement, which damages the jury assessed, as to plaintiff-sole, at $4,000 and as to plaintiff-guardian, on behalf of her two minor wards, at $8,500. Defendant contended throughout the litigation that the release in question was invalid for certain stated reasons, and could in no way release any claim of the plaintiff as an individual or of her children, as minors, under said agreement or the divorce decree incorporating the same, and that if the release was not efficacious so to do on the date of its delivery to the Defendant, then neither plaintiff as an individual nor either of her wards could suffer any damages as a result thereof. Further, that if the release were valid, then the measure of plaintiff's damages was as set forth in the instruction of the court, namely, "the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, canceled, or released by plaintiff under the terms of the release in evidence, and the amount paid her under the evidence at the time of the execution of the release" (Tr. 374 "20").

The theory as to the measure of plaintiff's damages above set forth was recognized by all parties to the case, and the instruction above referred to became the law of the case. The Circuit Court of Appeals refused to recognize that this was the law of the case.

III.

The trial court erroneously permitted evidence of the filing of Plaintiff's claim in the Probate Court and its disallowance therein, over the objection of Defendant, to which the Defendant assigned error; and the Court of Appeals sustained the rulings of the trial court, when it clearly appears that the trial court considered that what transpired in the Probate Court was in fact immaterial and when it further appears that same was immaterial in view of the instruction given in respect to damages.

IV.

The Circuit Court of Appeals in effect found that the order of the Probate Court disallowing Plaintiff's alleged claim therein was predicated solely on the ground that the release was a bar thereto, when it appears from the evidence and under the law that irrespective of the interposition of said release the Probate Court would have had to enter such order.

V.

That the Circuit Court of Appeals should have sustained the position of Defendant that a higher degree of proof was required in a case of fraud and deceit than mere preponderance of evidence.

ARGUMENT.

I.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion decided an important question (principle) of law in a manner which conflicts with decisions of other United States Circuit Courts of Appeal and which conflicts with decisions of courts of the State of Illinois in reference to res adjudicata.

Defendant, in paragraph 15 of his Answer (Tr. 49 to 56) sets forth that in the suit commenced by Plaintiff in the Superior Court of Cook County against the Administratrix of the Estate of McConnell, deceased, et al., she alleged that the Release in question should be declared null and void by reason of the fact that it had been obtained from her by means of deceitful and fraudulent representations of this Defendant, said deceitful and fraudulent representations being the same as alleged in the instant case to have been made by Defendant herein, it clearly appearing that McConnell was not present at the time said representations were allegedly made; and also in said paragraph 15 of his Answer Defendant set forth the adjudication of said Superior Court of Cook County in respect to said allegations of fraud as follows (Tr. 55):

> " 'That no false or fraudulent representations were made by the said Henry V. McGurren to the said Gladys McVeigh to secure her release of the sum of Nine Thousand Dollars ($9,000.00) due and owing to her as alimony for her own support and maintenance from March 20, 1928, until April 7, 1933, the date of her remarriage . . .".

The trial court struck said paragraph 15 of Defendant's Answer (Tr. 70), the Defendant having pleaded that said findings of the Superior Court were *res adjudicata* and an estoppel to the Plaintiff to claim in this proceeding that the Defendant, Henry V. McGurren, had been guilty of the same acts attributed to him in the said Superior Court case, when said Superior Court had found that he was not guilty of those identical allegedly affirmative deceitful and fraudulent acts, the Defendant herein, in both cases being accused of being the immediate, active, tort-feasor, so that no other person could be culpable of the deceit and fraud alleged to have been perpetrated on plaintiff unless he was so guilty. And one of the points relied upon for reversal in the reviewing court was the striking by the trial court of said paragraph 15 of Defendant's Answer which set forth this defense (Tr. 382, "4"). The reviewing court in its opinion, however, makes no comment whatsoever in respect to this contention of Defendant; and in this connection it must be borne in mind that it nowhere appears in the record of this case that there were any representations made to induce Plaintiff to sign the Release in question other than or different from those alleged in the Superior Court suit; so that, if there were no fraudulent representations made to Gladys McVeigh to secure her release of what is alleged to be her individual claim, there could not have been any affirmative, fraudulent representations made in respect to any claim of the minor children which might be affected by the release, if it is true, as contended by plaintiff, that the minor children had a vested property interest under the property settlement agreement.

Defendant did, however, set up as a further defense for the purpose of showing that plaintiff-guardian was not entitled to recover damages, the fact that in the self-

same Superior Court case the Court found that plaintiff, as guardian of said minor children, was entitled to recover the sum of $8,000 from the Estate of McConnell, deceased, to be paid in due course of administration of said estate (Tr. 59). The opinion of the reviewing court says:

> "Defendant was not a party to the suit (Superior Court). Despite this fact, defendant insists that the allowance of the claim for the children for $8,000 and the finding that no false or fraudulent representations were made to plaintiff by McConnell or his representatives to secure the release and adjudging that she had released McConnell from any claims due her created an estoppel to maintain this suit. The decree discloses that as to the children the release was held ineffective." (Tr. 437.)

There is nothing in the record to show that the Superior Court so held, but even if it had so held, there was nothing in the decree and nothing is shown in the record to indicate that said Court found that the Defendant, McGurren, as to said two minor children, made any of the fraudulent, deceitful representations attributed to him. In other words, everything in the Superior Court decree is to the effect that McGurren, the Defendant herein, did not make the fraudulent, deceitful representations attributed to him in that suit (which are in fact the same representations as are attributed to him in this proceeding). The reviewing court in its opinion (Tr. 437) recognizes the principle that if an agent alone commits an act and is discharged, then in an action against his principal the principal may plead the discharge of the agent, but says that when the action is against the principal and the principal is discharged it does not then discharge the agent. And the reviewing court, predicating its decision upon this theory, refused to recognize—although it did not specifically so state—the right of the defendant to plead the findings of the Superior Court that he had not been guilty

of the self-same deceitful acts attributed to him in this cause, and also specifically refused to recognize his right to plead the finding of said Superior Court that plaintiff was entitled to only $8,000 as guardian of the two minor children, under the property settlement agreement, which said sum was to be paid out of the estate of McConnell, deceased, in due course of administration, when plaintiff alleged in the instant case that plaintiff-guardian had been damaged to the extent of a much larger sum of money by reason of the fact that her wards had been deprived of certain sums rightfully due them under the property settlement agreement by the disallowance of her claim against the Estate of McConnell by the Probate Court of Cook County predicated on the interposition of the Release as a bar thereto, which theory, however, plaintiff in fact abandoned as appears from the instructions given in this case and hereinafter considered.

The effect, however, of the reviewing court's opinion is to deprive Defendant of the right to plead the Superior Court findings that he was not guilty of the affirmative, deceitful, fraudulent acts attributed to him and to deprive him of the right to plead the judgment of the Superior Court in favor of plaintiff-guardian in the amount of $8,000 to be paid out of the estate of McConnell, deceased, on the ground that Defendant was not a party to the Superior Court proceeding and that there was therefore no privity and entire lack of mutuality. The opinion of the reviewing court in this respect conflicts with the decision of another United States Circuit Court of Appeals and also with decisions of the Courts of the State of Illinois.

It does not appear from the opinion of the reviewing court or from any other portion of the record that the alleged deceitful and fraudulent representations of De-

fendant in the instant case were anything but identical with those alleged to have been made by him in the Superior Court case; and the allegations in both proceedings show that McGurren was the active tort-feasor: that is, the one directly culpable, if the fraud were committed, and it also definitely appears from both proceedings that while McGurren was McConnell's attorney at the time the representations were made, he was of necessity also McConnell's agent.

In the case of *Portland Gold Mining Co.* v. *Stratton's Independence, Ltd. et al.*, decided by the Circuit Court of Appeals of the Eighth Circuit and reported in 158 Federal Reporter at page 63, the very able Honorable Judge Van Devanter delivering the opinion, the Court had under consideration a case in which a principal pleaded a judgment of not guilty in favor of its agent which had been rendered in a tort action against the agent, the tortious acts attributed to the principal being the same tortious acts attributed to the agent in the prior suit wherein it appeared that the principal could not have been guilty of any tortious acts unless the agent, alleged to have been the active tort feasor, were guilty. The principle of law considered by the Court in this case was not the question of mutuality or of privity, but the question of whether, when a plaintiff had in a certain proceeding contended that he was entitled to recover by reason of certain acts perpetrated by a certain active tort-feasor and where it had been found that said active tort-feasor was not guilty of those acts, the same plaintiff could maintain a subsequent action against any other party predicated on the same tortious acts of the same active tort-feasor. That is, it having once been found that the active tort-feasor had not in fact perpetrated the tortious acts attributed to him, whether the Plaintiff could in any other or different proceeding against any other or different

person recover from such other or different person, when the right to recovery must be predicated upon the self-same active tort-feasor being guilty of the tortious acts of which he has been found not guilty in a prior proceeding. This is a principle of law which cannot be varied irrespective of all the various and different facts which may surround any particular piece of litigation. And this principle of law is applicable to the instant case. In the above cited case the Court, in establishing this principle, determined that it was applicable not only to a case where the suit which was pleaded as *res judicata* or estoppel was against the agent but also in cases where the principal had been sued and where the principal could not have been found guilty but for the establishment of culpable acts on the part of his agent, and that it was proper in such case for the agent to plead in a subsequent suit against him that such was the case. The courts have recognized that an agent may so plead, and it is a bar to a suit against the agent when the principal has been discharged predicated on a finding that that same agent was not guilty of the acts attributed to him in the suit against the principal. On page 65 and 66 of the cited case, in discussing objection (2) that one may not have the benefit of an adjudication as an estoppel unless he would have been prejudiced by it had it been the other way, the court says: "But it is quite generally held that these objections do not prevent an estoppel where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think that upon principle this ought to be true." What "principle" did the court refer to? Clearly to the principle that it once having been determined in a fair, judicial hearing upon the merits that certain culpable acts had not been perpetrated by a certain party, irrespective of whether that party was

acting as an agent or as a principal, then and in that case any party claiming injury by said culpable acts of said party is estopped or precluded from again bringing an action for damages predicated on the self-same acts of the self-same party.

That the Federal Court of Appeals in the above cited case recognized this as a principle of law rather than as a pure question of whether the action was brought in the first instance against the principal or in the first instance against the agent, appears from page 66, where the Court cites the case of *Emery* v. *Fowler,* 39 Me. 326 and says, "In a prior action by the plaintiff against the father for the same act the father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication," and then quotes from the opinion in the latter case, as follows:

> "'To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others.'"

This is exactly the same principle as was contended for by the Defendant in this case. The Superior Court case pleaded by the Defendant in paragraphs 13 and 15 of his Answer was one commenced by plaintiff-sole and plaintiff-guardian in this law suit to have declared null and void the release referred to in this suit for the reason that the

same was obtained by the same allegedly deceitful and fraudulent acts of the Defendant in this law suit; and after a hearing on the merits of the case the Superior Court found that this Defendant was not guilty of the deceitful, fraudulent acts attributed to him. There is nothing in the record to show that McConnell ever had any knowledge of the fraudulent, deceitful acts attributed to Defendant in both cases. In fact there is nothing in this case that shows that at the time Plaintiff's claim was disallowed in the Probate Court, allegedly by reason of the introduction of the Release as a bar thereto, Plaintiff then contended or made the least suggestion to the Probate Court or to this Defendant that she felt the Release was obtained by fraud. Certainly she knew of the fraud at that time, if any existed, and certainly, even if it be granted, which it never has been, that she could not have had the Probate Court set aside this Release for fraud, yet had she felt that fraud had been perpetrated she could have called the matter to the attention of the Probate Court and said that she was desirous of filing a bill to have the release declared null and void by reason of the alleged fraud; and there is no court in the world that would not have given her sufficient time to prepare and file such a bill and would not have stayed denial of her claim.

The above cited case very definitely holds that it is one of the exceptions to the necessity for privity and that the primary principle is one of public policy based on the maxim, "*Interest republicae ut sit finis litium.*"

The case of *Coca-Cola* v. *Pepsi-Cola Co.*, 36 Delaware 124, 172 Atl. Rep. 260, is a case decided by the Superior Court of Delaware and as such, we recognize, is not an authority that will be considered by this Court, but we feel that no more able discussion of the question could be presented to the Court than is in said case contained and therefore we quote from said case as follows, beginning on page 262 thereof:

"In determining the question as to whether a person not a party to a prior proceeding may take advantage of the disposition of such case in a subsequent action by a plea of *res judicata* directed against any adversary who had been a party to a first proceeding, we have attempted to discover the reason for the rule 'that estoppels must be mutual or that both litigants must be alike concluded by a judgment or it binds neither.' * * * We are interested in a case where no privity is shown to exist and our duty is to determine the necessity of such privity. In 24 A. and E. Encl. (2d Ed.) 731, is given the only concrete basis for the rule that we have found. There it is said

" 'The rule that a judgment or decree concludes only parties or privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the Constitution of the several States.'

"In a great majority of cases this given reason may be satisfactory, but it is immediately apparent that it cannot always be so for it is obvious that it can have application only when the doctrine is invoked *against one* who had not been a party to the former proceeding. This reason fails when applied to one who had been a party to the former proceedings, for he had not been deprived of any due process in the presentation of his rights or claims.

"(6) The doctrine of *res judicata* is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy. The primary object of *res judicata* (public policy) is based upon the maxim *republicae ut sit finis litium*—it concerns the commonwealth that there be a limit to litigation. 2 Freeman on Judgments, Sec. 626; 38 Yale

Law Journal 299; 33 C. J. 267. Many authorities include as a basis of *res judicata* the subordinate maxim *nemo debet bis vexari pro una et eadem causa*—no one ought to be twice vexed for one and the same cause. 2 Freeman on Judgments. Sec. 626; 38 Yale Law Journal 299; 45 C. J. 1379. It would seem, however, that this latter maxim has application only when the party is 'vexed' with litigation, as a defendant, and not when, he, himself, institutes it.

"The subject of *res judicata* may generally be divided into two main and distinct classes. The first class would include those cases where there is some privity or liability over between a party to the first suit and a party to the second suit. In this group would fall cases of master and servant, principal and surety, parties primarily and secondarily liable, and other like classifications. This group would be subdivided according to the character of the privity and the manner in which the estoppel was raised, but it is obvious that the facts of the present case do not call for a consideration of this group.

"The second class of cases include those where there is no liability over, either way, between the party pleading *res judicata* or against whom it is pleaded, and any party to the prior suit. In this group, so far as the facts appear the present controversy must be placed.

"The classification now considered must, however, be subdivided. for it would seem that two distinct principles are involved

"(a) Where the plea of *res judicata* is raised by a party to the prior suit against one who was not such a party;

"And

"(b) Where the plea of *res judicata* is raised by one not a party to the prior suit against one who was such a party.

"(a) This first class of cases gives full force and scope to the historical reason of the requirement of mutuality, viz., that no person should be deprived of his property without due process of law. The person against whom the plea is made was not a

party to the former proceeding and there is no liability over either way with any person that was a party to the first suit. There is no privity, if privity be given its generally accepted meaning of having 'mutuality or successive relationship to the same right of property.' Questions under this heading could often arise when two joint tort feasors are successively sued by the same plaintiff. A holding that a judgment against the first would be *res judicata* as to the second could be sustained on no sound principles.

"(b) A very different situation arises in the case where *res judicata* is pleaded by one not a party to the first suit against one who was such a party. This is our present case.

"It is quite apparent that a direct and decisive conflict now arises between the two principles; of requirement of mutuality of estoppel on the one hand, and, on the other, the basic principle of *res judicata*, viz., the limitation to a party to one full and free opportunity to try the merits of his case.

"(7) The present defendant pleading *res judicata* was not a party to the former proceeding and the judgment in the former proceeding did not bind it so there is no mutuality. The present plaintiff, against whom the *res judicata* is pleaded is alleged to have been the unsuccessful plaintiff in the former proceedings where the issues were alleged to have been identical with those here involved. We are not now passing upon the actual existence, as a fact, of the identity of the issues in the two proceedings, for that identity must be proven. But assuming the identity of the issues, we are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. *The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and retry all the old issues each time he can obtain a new adversary not in privity with his former one.*" (Italics ours.)

It is therefore contended on behalf of Defendant that the reviewing court erred in holding that the Defendant could not plead the findings and decree of the Superior Court of Cook County to the effect that he was not guilty of the deceitful acts attributed to him being the same identical acts attributed to him in this case as the actual tort-feasor in bar to the claim of plaintiff in this proceeding, said reviewing court having predicated its opinion on the theory that Defendant could not so plead by reason of the fact that he was not a party to said Superior Court suit, and further predicating its opinion on the theory that the Defendant was a joint tort-feasor, there being nothing in the record to show that he was a joint tort-feasor. But even if he were a joint tort-feasor, it having been found in the Superior Court case that he in fact had not committed the fraud under the principles above enunciated, it was error to deprive him of the defense of *res adjudicata.*

Defendant has also said that the aforesaid rulings of the reviewing court in reference to estoppel and *res judicata* were in conflict with decisions of the courts of the State of Illinois in respect to same. As has been indicated, there is nothing in this record to show that the defendant, in this case, McGurren, was a joint tort-feasor with any other person or persons. How could he be a joint tort-feasor when, in the Superior Court proceeding against the estate of his principal, McConnell, it was found that the release was not obtained by fraud, for in the action against McConnell's Estate the relief sought must be predicated either on a separate, distinct act of McConnell, independent of this Defendant, or on a separate, distinct act of this Defendant, as agent of McConnell, or on some joint act of both McConnell and this Defendant which rendered them jointly and severally liable. There is nothing in the in-

stant case which shows that McConnell had any knowledge whatsoever of the acts attributed to McGurren. In the Superior Court case, which was against McConnell's Estate (and being against his estate any acts attributed to him would be binding on his estate), it was found that the release was obtained without any fraud; and such a finding could not have been made if there had been any fraud by McConnell or any fraud by McGurren, his agent, this Defendant; therefore, there could not possibly have been any joint tortious act and McConnell and this Defendant could not have been joint tort-feasors. Therefore, the action against this Defendant, if it can be maintained at all, must be maintained against him as a single tort-feasor and not as a joint tort-feasor with McConnell; and, therefore, the action in the Superior Court could only have been maintained on the theory of *respondeat superior.* That is, since McGurren was the agent of McConnell, McConnell was in all ways bound by and liable for any torts committed by McGurren as his agent under the doctrine of *respondeat superior.* It is a law of the State of Illinois that if the master or principal has been found not guilty of a tortious act attributed to his servant or agent and for which he would be responsible under the doctrine of *respondeat superior,* then and in that case in an action against the agent the agent may plead the fact that it has been determined that his superior is not guilty by reason of the fact that said agent had not been guilty of the acts attributed to him. The reviewing court failed entirely to recognize this principle of local law.

In the case of *Anderson* v. *West Chicago St. R. R. Co.,* 200 Ill. 329, the Court had under consideration an action in which a lessor was sued by reason of the negligence of his lessee, there being no direct negligence attributed to the lessor, and on page 333 the Court says:

> "The relation between them so far as it has reference to such damage, is not that of landlord and tenant, but that of principal and agent or master and servant. Both being liable to the party injured, such party could sue them both in the same action or sue each one separately, but if one was not guilty of the tort the other one could not be. It is not a case where the allegation is that two different parties have committed a tort to the person or property of the plaintiff and thus each one of them would be individually liable, and where it might turn out on the trial that one of the parties was innocent of any actionable wrong."

Further, the court says on the bottom of page 333:

> "It must follow, then, that if, in a suit brought against the lessor in which the tort complained of is in fact the tort of the lessee, a verdict of not guilty is rendered,—that is, that there was no actionable wrong committed against the plaintiff by the lessor—no actionable wrong could have been committed against him by the lessee in the premises, for it is the lessee's wrong that in these cases constitutes the basis of the action against the lessor."

Further, citing from *Lake Shore and Michigan Southern Railway Co.* v. *Goldberg,* 2 Ill. App. 228, the court says, on page 334:

> " 'Where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be.' "

The court then cites and quotes from *Emery* v. *Fowler,* 39 Me. 326, on page 334, the paragraph hereinbefore referred to. And, on page 339, the court says:

> "We think that both on principle and authority the judgment in the suit of appellant against the lessor of appellee is an absolute bar to his recovery in this suit."

The principles of law set forth in the foregoing cases apply to the case before the Court, for it is evident that

each of said cases, among other things, points out the absurdity of permitting a plaintiff to sue the agent of the principal when plaintiff has failed to recover in a suit against the principal predicated on exactly the same tortious acts attributed to the principal by reason of the same having been done by the agent. In each of the above cases, in order for the plaintiff to have recovered in the case which was pleaded as *res judicata* or estoppel, it would have been necessary that the plaintiff prove that defendant in the case in which said prior adjudication was pleaded was guilty of the self-same acts which in the prior case against his principal he had been found not guilty of. There is no contention in the case before the Court that McConnell was a joint tort feasor; but even if the cause of action had been sufficiently comprehensive to have established that McConnell was jointly liable with McGurren by reason of connivance with McGurren to perpetrate the fraud and deceit alleged, yet McConnell was not present at any of the conferences at which it is alleged the fraudulent and deceitful representations were made by defendant; neither is there any evidence to show that McConnell knew thereof. And so, regardless of anything which may have transpired between McConnell and defendant, prior to defendant's going to Los Angeles for McConnell which might possibly be construed as connivance; yet the state court having found that McGurren did not obtain the release by fraud, it is evident that neither McConnell nor McGurren could be held liable for said alleged fraudulent representations; for whatever may have happened between them, the finding of the state Court was to the effect that the transaction had not been consummated by reason of the fraud attributed to McGurren. Therefore, the doctrine set forth in the foregoing cases definitely applies to the case before the Court. The case of *Anderson* v. *West Chicago St. R. R. Co.*, 200 Ill. 329, above, is the law in

the State of Illinois, and the United States Circuit Court in this district is bound to follow that rule of law and not the rule of law of some other state or the ruling of a Federal Court in another state.

From all the foregoing it is evident that the refusal of the reviewing court to consider the plea of the Defendant that the Superior Court of Cook County had found him not guilty of the self-same fraudulent acts attributed to him in this proceeding was reversible error.

II.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of another Circuit Court of Appeals on the same matter in that the finding of the reviewing court, that the validity of the Release is immaterial, is tantamount to a determination by the reviewing court that the instruction in reference to the measure of damages given to the jury, although without objections or exceptions thereto, but in fact with the consent of Plaintiff thereto, was not the law of the case for the purposes of said appeal.

The reviewing court in its opinion says (Tr. 439):

> "Defendant insists that the court erred in denying his motion for a directed verdict on the ground that the children were not injured by the Release for the reason that the mother had no authority to release their rights; that as guardian she could not release the claims and that all rights under the agreement were merged in the decree of divorce, any discharge of which, to be effective would require approval by the court.
>
> "Both parties have heretofore contended at various stages that the release was invalid. This question of legality, however, seems wholly immaterial. * * * Here plaintiff, relying upon the fraud, accepted a nominal settlement."

and says (Tr. 442):

> "We have discussed elsewhere the question of immateriality of validity of the release."

It has never been contended by the Defendant that the question of the validity of the Release was in any way a determining factor as to whether or not the Defendant may or may not have made the affirmative, fraudulent, deceitful representations attributed to him but the Defendant has at all times maintained that the question as to whether or not Plaintiff-sole or the wards of Plaintiff-guardian suffered any substantial general damages by reason of the execution of said Release allegedly obtained by fraud depended entirely upon the validity of the Release to release any rights of Plaintiff-sole or Plaintiff-guardian under the Property Settlement Agreement incorporated in and approved by the decree of divorce. It must be borne in mind that the suit was brought by Plaintiff in two capacities, *i. e.*, as an individual and as the legally appointed guardian of her two minor children, being appointed on the 18th day of September, 1936, long subsequent to the execution of the Release in question, and the Court so instructed the jury (Tr. 369, "3"), and further, in connection with his charge to the jury, the court required the jury to answer two interrogatories one showing what, if any, general damages the plaintiff-sole had suffered, and two, what damages, if any, had been sustained by Plaintiff in her capacity as guardian of the persons and estates of her minor wards (Tr. 375, "22"), and the jury answered said interrogatory one by finding that the Plaintiff-sole was entitled to $4000, and answered interrogatory two by finding that the Plaintiff as guardian of the minor wards was entitled to recover for them the sum of $8500. (Tr. 376.)

The correctness of Defendant's contention that the va-

lidity of the Release must be established by the Plaintiff in order to make a recovery cannot be controverted after making a careful examination of the position taken by Plaintiff as the trial progressed and a consideration of the instruction given by the Court and assented to by the Plaintiff in respect to the measure of general damages. There was no evidence of special damages (Tr. 301) and no award of punitive damages. (Tr. 376.)

During the trial, the pertinency of any matter or thing that transpired in the Probate Court and the measure of damages applicable to the case were discussed by the court and counsel. (Tr. 183, 301, 304, 352.)

The court, on the question of general damages, instructed the jury as follows (Tr. 374) (italics ours):

> "The matter of general damages, without any intention to convey to the jury any facts in issue in this case that the general damage is recoverable in a case of this kind, are the difference between the fair and reasonable *value at the time and place in question of the claim or right surrendered, cancelled, or released* by the plaintiff *under the terms of the release in evidence*, and the amount paid her under the evidence at the time of the execution of such release."

The reviewing court also says: (Tr. 439)

> "Defendant insists that the court erred in denying his motion for a directed verdict on the ground that the children were not injured by the release for the reason that the mother had no authority to release their rights; that as guardian she could not release the claims and that all rights under the agreement were merged in the decree of divorce, any discharge of which, to be effective, would require approval by the court."

Defendant had contended in his motions directed to the sufficiency of Plaintiff's Amended Complaint (Tr. 22 to

25) that the Release was invalid as to the minor children, wards of Plaintiff-guardian, for reasons as follows:

"(2) It further clearly appears from the face of the so-called Property Settlement Agreement dated March 20, 1928, mentioned in said amended complaint and copy of which is attached thereto as a part of Exhibit 'A,' that neither of said minors, nor their said Guardian, are parties, directly or indirectly, thereto. And, since by the very terms of said agreement the monthly payments therein agreed to be contributed by Thomas McConnell for the future support and maintenance of his children, then in the custody of their mother under the terms of said agreement, are payable to her in her individual capacity alone, said moneys and the unpaid accumulations thereof cannot, as a matter of law, be recovered in an action by the guardian of said minors for their benefits.

"It will be observed that by the terms of said agreement said support money is made payable to Gladys McConnell (now Gladys McVeigh) in her personal and individual and not in any representative capacity, such as Guardian of said children. Said contract can, therefore as a matter of law, not be made the basis of an action brought for the benefit of said minors.

"(3) The release indenture mentioned in said amended complaint, and copy of which is attached thereto as Exhibit 'B,' was, (as appears from the face thereof), not signed or consented to by any party pretending, or lawfully authorized, to represent said minors as their Guardian, and by its terms (see Clause 'Second' thereof) expressly negatives any intention to thereby in anywise affect or release said Thomas McConnell from his statutory obligations under the laws of California to provide support for his minor children. Hence the execution of said release by Gladys McVeigh in her personal capacity, as a

matter of law, neither prejudiced or injured said minors in any of their supposed rights and cannot, therefore, be made the basis of any claim on their part for damages on account of the fraudulent representations charged in said amended complaint.

"(4) It further clearly appears from said release itself, and said amended complaint, that the execution of said release by said Gladys McVeigh was never authorized or approved by any court of law or equity having jurisdiction over the persons and estates of said minors, and it is, therefore, not binding upon them or their Guardian, and, so, cannot be made the basis of any right of action brought for the benefit of said minors, they not having been injured or prejudiced thereby in any respect."

Each and all of the above contentions were raised by the Defendant in his motion for a directed verdict, motion for a new trial, and motion for arrest of judgment, and as specifications of errors relied upon in the appeal. (Tr. 337, 376, 377, 380, 381, 382, 384, 385, 386.) It appears from the opinion of the Court of Appeals that said Court while realizing the contention of the Defendant that the release was invalid for the foregoing reasons, and while clearly recognizing the soundness of Defendant's position, maintained that the validity of the release was immaterial and that therefore it could not affect the rights of plaintiff-sole or the rights of plaintiff-guardian to recover predicated on the alleged deceitful representations. Defendant has at all times contended that under the instruction above referred to it was imperative that the plaintiff establish that the release was valid and that plaintiff did on the date of the execution of said release and for the consideration therein mentioned, effectually release all rights or claims that she had as an individual, plaintiff-sole, and all rights and claims that her said two

children had under the property settlement agreement, and that her damage sole and the damage to the estates of her two children which she might recover as guardian of their estates was the difference between the value of what plaintiff-sole and plaintiff-guardian and each of them there and then parted with and the consideration that they received under the release on the date of the execution thereof. It is pertinent at this point to call the Court's attention to the fact that Defendant at all time has contended that the Release did not in fact release any vested rights of the children in the property settlement agreement or decrees of divorce incorporating the same.

In the case of *F. W. Woolworth Co.* v. *Carriker,* 107 Fed. 2d 689, (C.C.A. 8th Circuit), the Court in its opinion says, on page 692:

> "A general verdict of a jury is the composite result of the facts found by the jury and the law as given to the jury in the charge. Where there are no exceptions to a statement as to the law in the charge, this Court has repeatedly held that such statement becomes the law of the case for purposes of an appeal. * * * Plaintiff made no exceptions to the charge. Defendant made several exceptions to the charge but makes no challenge of the charge here. As to this Court on this appeal, the effect is the same as though no exceptions had been taken to the charge; therefore the charge is the law of the case as to this appeal."

In the case of *Skaggs Safeway Stores Inc.* v. *Dunkle,* 49 Fed. 2d. 169, (C.C.A. 8th Circuit) the defendant, on appeal, argued that the evidence showed that plaintiff had been guilty of contributory negligence. As to this, the Court says, page 172:

> "Accepting this contention as a proper statement of the law, it is not available to the defendant here,

> because the court specifically instructed the jury that there was no evidence that plaintiff was guilty of any contributory negligence after the time that his truck got into the pathway of the defendant's car, and this instruction, as has already been observed, was not excepted to. There is therefore no question of concurrent negligence presented by this record."

The instruction referred to by the Court appears on page 171, first column, as follows:

> " 'There is no evidence that Mr. Dunkle, the plaintiff, was guilty of any contributory negligence after the time that the Ford truck got into the pathway of automobiles going east on Holdrege Street. So you are to eliminate all question of whether or not the plaintiff was guilty of contributory negligence. * * *' "

On the same page, at the bottom of that column, there is another instruction referred to, which we are not interested in, and then the Court says:

> "(1-3) These instructions, not having been excepted to, became the law of the case. * * *"

In the case of *Kurn* v. *Stanfield,* 111 Fed. 2d 469, the Circuit Court of Appeals for the 8th Circuit had occasion to consider an instruction which was given by the court to the jury, and on page 474, the court says:

> "But we are not required to consider the point here. The record shows that the court told the jury in the charge that the amount to be assessed as damages was limited by the amount prayed for in the petition, to-wit $60,000. The trustees were then given opportunity to object to the charge, but found no fault with this part of it. The declarations of the charge to which no objections were taken became the law of the case for purposes of an appeal."

It has long been the law that when a case by mutual consent has been tried on a certain theory that neither

party can object in the reviewing court to evidence or instructions which have been given to the jury predicated on that theory. In the case of *San Juan Light Co.* v. *Requena,* 224 U. S. 89, on page 97, the court says:

> "Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of variance. Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, the court among other things discussed the effect of argument during the trial of the case and briefs of counsel which in effect recognize a certain hypothesis, and on page 435, the court says:

> "In other words, as the court below in deciding the case expressly declared that the course of the argument and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such."

The instruction referred to became the law in this case, as it was assented to by plaintiff, as indicated (Tr. 183). It therefore became incumbent upon plaintiff in this suit to establish as a matter of law and fact, among other things: (1) that the affixing of the signature "Gladys McVeigh" to said release was done with such authority and right that the same did in law and in fact release the vested rights of the minor children in the decrees of divorce incorporating the agreement and the agreement;

and (2) that the release is subject to the construction that it is an effective release of the vested property rights of said minor children in the decrees of divorce incorporating the agreement, if said children had any such vested property rights.

Under the foregoing instruction the jury found general damages suffered by the said minor children, which plaintiff in her capacity as their guardian was entitled to recover, in the sum of $8,500 (Tr. 376). Therefore, the jury must have found that the said sum of $8,500 represented the difference between the value of the rights of the children under the decrees of divorce incorporating the agreement and the amount paid plaintiff under the release, namely $1,250; and no part of said $8,500 was allowed for any other kind or character of damages. In other words, that by the execution of the release the two minor children, wards of plaintiff-guardian, suffered general damage in the sum of $8,500.

If the release was not effective by reason of either proposition "(1)" or "(2)" above set forth, the execution of the same by plaintiff, Gladys McVeigh, and by this Defendant as agent for McConnell, became absolutely immaterial and of no effect whatsoever as far as the said children, wards of plaintiff-guardian, were concerned; and it was immaterial whether the execution of the same was procured by fraud of this defendant or otherwise.

The theory of this case presented by the instruction aforesaid and upon which the case was tried was not that plaintiff could not have suffered any injury by reason of any alleged deceitful acts of defendant, but that the only damages that plaintiff was entitled to recover under the instruction given by the court to the jury, and the only damages that the jury under said instruction could

consider or possibly award to the plaintiff were such damages as came within the strict provisions of the instructions.

We have heretofore referred to the instruction given by the court and assented to by plaintiff as to what the measure of general damages should be. We have also referred to the special instructions given to the jury directing them to determine what general damages, if any, had been sustained by plaintiff-sole and what general damages, if any, were recoverable by plaintiff as guardian on behalf of the estates of the two minor children.

Under the instruction the reviewing court could not consider as an element of damages in this law suit any damages except such as were clearly within the purview of the instructions given and the theory upon which plaintiff tried her law suit in the trial court. And the reviewing court, in holding that the question of the validity of the Release was immaterial, in effect failed to recognize the principle of law enunciated by the Circuit Courts of Appeal and above referred to.

The refusal of the reviewing court to consider the case on the above basis, was an error causing grave prejudice to the defendant. Especially is this true as the trial court had taken the position, in which plaintiff's attorney concurred, that what transpired in the Probate Court and whatever monies were in the Probate Court had nothing to do with the question of damages suffered by plaintiff, either sole or guardian. This worked an extreme injustice to defendant, which can be fully ascertained only by an examination of proceedings in the trial pertinent thereto, the same being as follows:

On January 17, 1940, the witness Lloyd Faxon was called on behalf of plaintiff (Tr. 147) and over the objection of counsel for defendant testified that the Release in

question was handed to the Probate Court by the defendant with the statement that it was a Release and a bar to the claim filed by Gladys McVeigh (plaintiff); that there was no other evidence or testimony at said hearing in the Probate Court; and that the said claim was disallowed by the Probate Court. Thereafter, on January 18, 1940, in the afternoon session of the trial court, during the plaintiff's case-in-chief, there was under consideration a stipulation in regard to the value of certain property owned by McConnell during his lifetime, which stipulation did not, however, indicate the ownership of said property by McConnell on March 18, 1935, the date of the execution of the Release. (Tr. 180.) Defendant objected to the introduction of said Exhibit because it did not show that McConnell owned said property on the date of the execution of the Release (Tr. 182), defendant contending that each and every fact set forth in said stipulation was immaterial and irrelevant and in no way binding upon the defendant; and in connection therewith the following discussion was had:

> "The Court: As to the securities you have on March 18th, and up to that time, July 31st, August 3rd, you have the value of the shares or certificates left. You have the value at that time and then the value on March 6th. I don't take it that it is of any consequence what the value might have been on other dates on counsel's theory of the case. It is what he had when it is claimed these representations were made.
>
> "Mr. Healy: That is the measure of damages.
>
> "The Court: I take it that must be the measure of damages.
>
> "Mr. Healy: Oh, that is the measure of damages.
>
> "The Court: So I will let it all go in. It is a question for the jury." (Tr. 183.)
>
> "Mr. Soelke: All right. Then you remember in the early history of the case there were motions made to strike on the ground of misjoinder of parties, and

at that time your Honor ruled, under some special rule relevant to that, regardless of what the pleadings were, it depended upon proof, and that your disposition with reference to that matter was subject to the whole thing being presented to the court on the trial, and if at that time it appeared there was no interest that the plaintiff could prove and establish, then you would entertain a motion to dismiss that claim out of the case. Wasn't that about it?

"The Court: * * * You (Mr. Soelke) may bring in your written motion tomorrow morning. I will regard it as though it were filed today." (Tr. 184.)

From the foregoing it appears that plaintiff definitely adopted the theory of damages in this case set forth in Instruction No. 20 (Tr. 374) before she rested. The theory of damages is a highly important element in actions of fraud and deceit and in order to recover in an action for fraud and deceit not only must there have been deceitful representations made, but they must have been made knowingly and with intent that the other party should act upon them and, further, they must have been acted on by the other party in such a manner as to cause the other party damage. It is therefore self-evident that no matter how deceitful the representations may have been intended to be, or how strong the intent was that the other party should act thereon, yet if the representations were in fact true, then there can be no action for damages as one of the primary elements of an action of deceit is lacking. And it further follows that, if there is a fraud and deceit, but the fraud and deceit does not result in damage to the other party, then and in that case also one of the primary elements of an action or cause for deceit fails. And it is respectfully contended by defendant that the plaintiff, both sole and guardian, having predicated her case upon the measure of damages theory referred to, fails to prove any damage and also fails to prove one of the primary elements of her cause of action unless said

RELEASE was valid and efficacious to and did in fact release all rights of plaintiff-sole and/or rights of plaintiff-guardian, if any, on the date of its execution—from which date it must have been efficacious, if it were ever at any time efficacious—in the property settlement agreement as incorporated in the decrees of divorce. There is no ambiguity in and no ground for enlarging upon or restricting Instruction 20 in reference to the measure of general damages. The measure of general damages is clearly and specifically "the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, cancelled, or released by the plaintiff under the terms of the release in evidence, and the amount paid her under the evidence at the time of the execution of such release" (Tr. 374).

The prejudice to Defendant by this position of the reviewing court is further apparent when considered with the fact that the Defendant specifically pleaded that the release in question was not the ground upon which the Probate Court disallowed the claim of Plaintiff therein and also contended that the Plaintiff never filed a claim in the Probate Court in any representative capacity on behalf of the two minor children. In paragraph 13 of his Answer to the Amended Complaint of Plaintiff (Tr. 42 to 48) Defendant set forth in full the defenses raised by the Administratrix of the Estate of Thomas McConnell, deceased, to the claim of Plaintiff filed in said Estate. On motion of Plaintiff that said paragraph 13 "contains matters wholly immaterial and foreign to the proper issues herein in pleading verbatim the objection and answer of Ruth T. McConnell, individually and as administratrix to the claim of Plaintiff in the Probate Court of Cook County, Illinois" (Tr. 61); the Court struck said paragraph 13 of Defendant's Answer (Tr. 70); and this notwithstanding the fact that Plaintiff, in paragraph 13 of her Amended

Complaint, had pleaded that "but for said fraudulently obtained release * * * she had a clear and incontestable claim in her own behalf and as guardian of the persons and estate of Thomas McConnell and Charles Dewey McConnell, minors, in an amount of Twenty-five Thousand Dollars" against the Estate of Thomas McConnell, deceased (Tr. 19, 20). Clearly this allegation of the Plaintiff made pertinent the setting forth in Defendant's Answer of the various defenses raised by the Administratrix of the Estate of McConnell to the allowance of Plaintiff's claim in said Estate, not as evidence of the facts therein set forth, but as evidence that other defenses than the RELEASE in question had been raised.

The Court, having refused to allow the Defendant to plead anything that transpired in the Probate Court on the contention that it was immaterial and irrelevant, although Plaintiff had pleaded in her complaint that her claim in the Probate Court had been disallowed solely by reason of the interposition of the release in question and had introduced evidence in support thereof; and the Court, subsequent to the introduction of said evidence by Plaintiff, having refused the offer of the Defendant to show that the Plaintiff was put on full proof of her claim in the Probate Court (the Court holding that such evidence was immaterial and irrelevant, Tr. 302 and 304), did thereby deprive the Defendant of the opportunity to rebut the evidence and contention of the Plaintiff that her claim in the Probate Court had been disallowed solely because that release was held as a bar thereto. However, all this became and was immaterial, as held by the Court, in view of the position taken by counsel for Plaintiff and by the Court and in view of the instructions given by the Court to the jury, for, as heretofore stated, under that instruction what happened in the Probate Court was immaterial; and it cannot be argued that the validity of the release

was immaterial simply because Defendant presented the same as a bar to Plaintiff's claim in the Probate Court.

Plaintiff's cause of action as presented to the jury was not predicated on damages caused by the interposition of the RELEASE in the Probate Court but was predicated on damages suffered by reason of the fraud and deceit within the purview and only within the purview of the instruction given. The position taken by counsel for Plaintiff, and the rulings of the Court that what transpired in the Probate Court was immaterial, and the refusal of the Court, on that ground, to permit the Defendant to present any evidence as to what happened in the Probate Court, would have been highly prejudicial to the Defendant had any other instruction been given to the jury than one which excluded from the consideration of the jury the question of damages arising out of the presentation of the RELEASE as a bar to the claim of the Plaintiff in the Probate Court; and it is not an answer to that proposition for Plaintiff to contend, or for the court to hold, that if the RELEASE were obtained by fraud the presentation of the same in the Probate Court as a bar to Plaintiff's claim therein brought the fraud to fruition. It was immaterial whether or not the release was obtained by fraud and whether the RELEASE in itself might have been a bar to the claim of the Plaintiff in the Probate Court if there were other reasons presented to the Probate Court why Plaintiff's claim should not be allowed therein; and if the Court had held that the matters and things that happened in the Probate Court in reference to said release were material then it was material and proper for the Defendant to show that the claim in the Probate Court was not disallowed by reason of the interposition of the release, or was disallowed for other reasons also, for, if it were disallowed for some other reason, then it could make no difference whether or not the release was inter-

posed and whether or not it was fraudulent. As a matter of fact, it clearly appears that had the Court permitted the Defendant to show the objections of the Administratrix of the Estate of Thomas McConnell, deceased, to the claim of Plaintiff in the Probate Court, and to introduce the same in evidence, it would appear that the claim in the Probate Court would have been disallowed irrespective of the release, because the Administratrix denied that the Estate was indebted to the claimant and put her upon strict proof. This proof the record clearly shows she did not make, as Lloyd Faxon, Plaintiff's own witness, in his testimony herein says that the only evidence or testimony at the hearing in the Probate Court was the presentation of the release (Tr. 157); and there was then and at that time, in full force and effect, a statute of the State of Illinois which is in words and figures as follows, to-wit:

> Illinois Revised Statutes—Administration of Estates —Claims against estates: * * * when and where such claimant shall produce his claim in writing; and if no objection is made to said claim by the executor, administrator, widow, heirs or others interested in said estate, and the claimant swears, that such claim is just and unpaid, after allowing all just credits, the court may allow such claim without further evidence, but if objection is made to such claim the same shall not be allowed without other sufficient evidence. * * * (1937 Ill. Revised Statutes, State Bar Association Edition, Chapter 3, Par. 61, Sec. 60.)

This statute was interpreted in *Kingan & Co., Ltd.* v. *Estate of Burns,* 104 Ill. App. 661, and applied in disallowing a claim because it was not supported by "other sufficient evidence" after objections to the claim had been filed.

It therefore appears that but for the position taken by Plaintiff in this law suit, that what transpired in the Probate Court was immaterial, the Defendant could have established, by simply introducing the objections filed in said court by the Administratrix of the Estate of Thomas

McConnell, deceased, to said claim of the Plaintiff therein, that the Probate Court would have disallowed said claim irrespective of the presentation of the release, and this without taking into consideration the other evidence which, had it been considered material and pertinent, the Defendant could have presented to the trial court to show that the claim in the Probate Court was disallowed for reasons other than the introduction of the release as a bar thereto. Of course, after the successive positions of the trial court and counsel for plaintiff that such happenings were immaterial, and upon its appearing that the basis of damages and the instruction to the jury in that respect would be of the character as was in fact given to the jury, the Defendant naturally rested his case.

The highly prejudicial position of the Court of Appeals in failing to recognize that they are bound by Instruction No. 20 (Tr. 374) given to the jury in reference to the measure of damages, further appears from the fact that not only did Defendant in paragraph 13 of his Answer set forth, among other objections of the Administratrix to the allowance of the claim of Plaintiff in the Probate Court, the contention of the Administratrix that the allowance of said claim, predicated on the property settlement agreement and/or the decrees of divorce incorporating the same was contrary to public policy of the State of Illinois (Tr. 44 "8"), which said portion of Defendant's Answer the Court struck on the basis that the same was immaterial and irrelevant; but Defendant also, in Paragraph 18 of his Answer (Tr. 58) set forth that the allowance of the claim of Plaintiff in the Probate Court predicated on said property settlement agreement as approved by and incorporated in the decrees of divorce out of the Estate of McConnell, the property being located in the State of Illinois, would have been contrary to public policy of the State of Illinois, which said portion of

Defendant's Answer the Court also struck on the theory that the gist of the action is fraud and deceit and "it is no defense to allege that the release is invalid, or was not validly executed, or that it is against the public policy of the States of California or Illinois" (Tr. 68). This position of the Court was taken before the case was in fact at issue and long prior to the trial of the case, the making of the various statements hereinbefore referred to as to what was the measure of damages, and the giving to the jury of Instruction 20 as to what was the measure of damages.

From all that we have said, it must definitely appear that the only way that the jury could assess damages under the instruction given by the Court was on the theory that the release was valid and efficacious to release any vested rights of plaintiff-sole and/or plaintiff-guardian under the property settlement agreement approved by and incorporated in the divorce decrees. It is evident that in the first instance Plaintiff predicated her cause of action on the theory that the Probate Court had disallowed the claim on the basis of a valid release which had been in fact obtained by fraud, but that during the trial of the case, and before its termination, Plaintiff entirely switched her position and predicated her theory of damages exclusively upon the basis of damages as set forth in Instruction 20 (Tr. 374).

III.

The United States Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in respect to the establishment of claims in the Probate Court in the State of Illinois.

The Defendant in Paragraph 15 of his answer set forth the written objections filed by the administratrix of McConnell's estate in the Probate Court, objecting and contesting the claim of the Plaintiff (Tr. 42). The trial court sustained the motion of the Plaintiff that the same was immaterial (Tr. 63). The reviewing court affirmed this ruling. The Defendant during the trial offered in evidence (Tr. 302, 304, 352, 353) the objection of the administratrix filed in the Probate Court which has heretofore been referred to wherein she demanded strict proof of the Plaintiff, the claimant in said court, of each and all material allegations in support of such amounts as she claimed due her. The trial court sustained the objection of the Plaintiff to the acceptance of the same in evidence. The Defendant's attorney called to the attention of the trial court and the attorney of the Plaintiff that under the rule in respect to establishing claims in the Probate Court when objections are made thereto by the representative of the estate full proof thereof must be made. The Plaintiff had presented her alleged amended claim (Exhibit 5) over objection of counsel for Defendant, and then as heretofore in a prior point referred to, placed the witness Faxon, her attorney in said probate proceeding, on the stand, and he, over objection of the Defendant, testified in respect to the

presentation of the Release in evidence to the Probate Court as follows (Tr. 157):

> "Q. Was there anything else heard in the way of testimony or evidence by the court at that hearing?
> (Objection by Mr. Soelke; objection overruled.)
> A. There was no testimony whatsoever.
> Q. Was there any other evidence?
> (Objection by Mr. Soelke; objection overruled.)
> A. No other evidence."

Plaintiff offered in evidence order of the Probate Court disallowing the Plaintiff's amended claim, being Exhibit 6 (Tr. 156) to which Defendant objected. The offer was in fact made at a prior session (Tr. 148), and it was objected to: "Mr. Soelke: I object to this as incompetent, irrelevant and immaterial." There was a discussion of the admissibility of the claim and the order, and counsel for Plaintiff said (Tr. 149) that he wanted to show "that this defendant, acting as attorney at this time for Ruth McConnell, the widow and administratrix, himself interposed (the release) before that Court, and it was the sole and only matter heard by the Court in the way of evidence."

We have heretofore called attention of the Court to the statute of the State of Illinois and the rule which sets forth the procedure which must be followed by a claimant in establishing a claim in the Probate Court of Illinois when, after the claim has been filed, it has been objected to: that is, claimant must make due and full proof of the claim by material and competent evidence given by a competent witness. It therefore appears that that portion of Defendant's Answer which sets forth what transpired in the Probate Court, and the offer of the Defendant of evidence of the fact that the Administratrix of the Estate of McConnell made specific objections to Plaintiff's claim and put claimant on strict proof of the

claim, were exceedingly material—not from the standpoint of evidence of any matter or thing contained in said objections, but from the standpoint of showing that plaintiff's claim was not denied by the Probate Court solely on the ground that the release was a bar thereto, and also for the purpose of showing that Plaintiff had not made proper proof of her claim in the Probate Court and that the order of the Probate Court denying same was proper for that reason. If it was material to Plaintiff's case to establish that her claim in the Probate Court had been disallowed solely on the ground of the interposition of the release as a bar thereto, then it was equally as material, if not more material, that the Defendant be given the right to plead and show that it was disallowed on some other ground; for if it were disallowed on some other ground then it became entirely immaterial on any theory of the case whether or not the release may also have been held as a bar to said claim by the Probate Court. The only deduction that one can make from the opinion of the reviewing court is that it determined, contrary to the statute of the State of Illinois governing the procedure for establishment of a claim in the Probate Court when same has been objected to, that it was not necessary to introduce evidence to prove the claim and that the filing of the claim in the Probate Court was of itself sufficient, even when the claim was objected to. In this, the defendant maintains, the reviewing court erred.

Counsel for Defendant, during the trial of the case, called attention to the fact that when objections were filed to a claim in the Probate Court then the claimant must make proof in open court, and also called attention to the fact that there was no proof introduced by plaintiff as claimant in the Probate Court (Tr. 302, 303).

IV.

The opinion of the Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a manner probably in conflict with applicable local decisions, in that it determined that when a case is predicated upon affirmative, fraudulent, deceitful representations it is not necessary that the same be proved by a clear preponderance of the evidence.

While it appears that there was a conflict in the evidence as to whether or not the Defendant, McGurren, made the affirmative, fraudulent, deceitful representations attributed to him; yet we have shown that as to the first meeting, at the Hollywood Hotel, there was only the testimony of the plaintiff and the defendant, no other parties having been present, that as to the conference at the City Prosecutor's Office on March 15th, there is the testimony of Defendant and two corroborating witnesses, while plaintiff under oath absolutely denies that there was any such conference held, maintaining that the conference on that date was the one at the Hollywood Hotel and that she had no conference at the Prosecutor's Office except the conference of March 18th at which the release was executed (and there can be no question, after considering the evidence, but what the plaintiff deliberately avoided admitting that there was a first conference in the Prosecutor's Office on March 15th); and that, as to the conference at the City Prosecutor's Office on March 18th, there is the testimony of Plaintiff, which is somewhat substantiated by the testimony of her attorney Ham, in respect to the alleged deceitful representations of Defendant and there is the testimony of Defendant, denying that he made the said deceitful representations, which is substantiated by the testimony of two other witnesses.

It is interesting to note that the fee of $500 paid McGurren by McConnell for going to Los Angeles for him was very small (Tr. 220) and also that defendant, McGurren, had no financial interest in McConnell's property or estate and has no interest in the outcome of this litigation other than to protect himself against the assessment of damages. On the other hand, Plaintiff, if she were successful, could expect to receive a very substantial sum of money. Cases of this character are quasi-criminal in aspect; and while there may be many decisions in cases of this kind where the question as to whether mere preponderance of the evidence is sufficient is not raised, we know of no carefully adjudicated case where mere preponderance of evidence has been held sufficient to sustain a verdict finding the defendant guilty of fraud and deceit of this character.

Defendant requested that the Court give an instruction as follows:

> "The jury, however, is further instructed that they are not to assume from anything said in these instructions by the Court in reference to the subject matter of damages that the Court intends to convey the idea, as a matter of fact, that damages have in fact been sustained by the plaintiff. On the contrary, if the jury should find the issues for the defendant: that is, if the plaintiff has failed to prove *clearly to the satisfaction of the jury* by a preponderance of the evidence that the statements alleged were not made, or if made were not false, or if falsely made were not relied upon by the plaintiff and that she was not deceived thereby, then, under such conditions, it will not be necessary for the jury to consider the matter of damages at all" (Tr. 347, "VII").

The Court gave said instruction but eliminated therefrom the words which we have italicized, namely, "clearly to

the satisfaction of the jury." Defendant also asked an instruction as follows:

> "The Court further instructs the jury that the burden of proof is upon the plaintiff in this case to prove by a *clear* preponderance of the evidence her said claims and contentions *above mentioned; that is to say,* it is incumbent upon the plaintiff to prove by a *clear* preponderance of the evidence each of the following propositions:
>
> "1. That the statements, or some one of them, above mentioned were made by the defendant to her at the time and place in question.
>
> "2. That such statement or statements, if any, so made, if they were made, by the defendant to the plaintiff, were then and there false and untrue.
>
> "3. That the defendant then and there knew, but that the plaintiff did not know then and there, that the said statement or statements, if any, were false and untrue.
>
> "4. That the plaintiff then and there relied upon such statement or statements, if any.
>
> "5. That the plaintiff so relying, if she did *so rely* on such statement or statements, if any, was injured.
>
> "And if the plaintiff fails to prove any of the foregoing propositions by a *clear* preponderance of the evidence in this case, then it is your duty to find a verdict for the defendant" (Tr. 344, 345, "III").

The Court gave said instruction, but with the italicized words eliminated therefrom.

Defendant contends that in a case of this nature he was entitled to have the above instructions given as requested by him, and further contends that the instructions as given by the Court with the italicized words eliminated were tantamount to telling the jury that mere preponderance of the evidence is sufficient. This is contrary to the law of the State of Illinois. In the case of *Carter* v. *Carter,* 283 Ill. 324, the Supreme Court of Illi-

nois had under consideration an action for wilful fraud and deceit and, on page 332, in discussing the matter, the court says:

> "All transactions are presumed to be fair and honest until the contrary is proved. Fraud will not be presumed, but must be proved as a fact by such clear and convincing evidence as leaves the mind well satisfied that the allegations of fraud are true," citing *McKenna* v. *Mickelberry*, 242 Ill. 117.

The Supreme Court of Illinois has also passed upon the same question in the case of *Shinn* v. *Shinn*, 91 Ill. 477, where the court had before it a bill which alleged William and Mary Ann Shinn had by fraud obtained an interest in certain real estate, and received benefits to which plaintiff was entitled, and asked for an accounting. On page 486, the court says:

> "But something more than suspicions are required to prove an allegation of fraud. The evidence must be clear and cogent, and must leave the mind well satisfied that the allegation is true.
>
> "In the face of all the evidence in this case, we cannot say that we are so satisfied."

CONCLUSION.

It is respectfully submitted that this Honorable Court should grant the writ of certiorari prayed for in the petition for each and all the various reasons set forth in I to VII, inclusive, on page 13 of the petition for the writ, predicated on each and all the errors hereinbefore set forth in the argument, and further respectfully submits that the judgment of the Circuit Court of Appeals for the Seventh Circuit (Tr. 443) should be reversed, and that said cause should be certified to this the Supreme Court for determination by it with the same power and authority and like effect as if the cause had been brought there by unrestricted writ of error or appeal.

Respectfully submitted,

By CHARLES H. SOELKE,
Counsel for Petitioner.

APR 25 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 923

HENRY V. McGURREN,
Petitioner-Defendant,

vs.

GLADYS McVEIGH, ETC.,
Respondent-Plaintiff.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THOMAS DODD HEALY,
BERNHARDT FRANK,
208 S. La Salle St.,
Chicago, Ill.,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

A.—STATEMENT OF THE CASE.

Petitioner seeks a review of the Judgment of the Circuit Court of Appeals for the Seventh Circuit (reported in 117 Fed. (2d) 672) affirming a judgment of the District Court upon a jury verdict finding that he, as Defendant below, had secured an instrument of release (Tr. 92) from respondent in March, 1935, by false and fraudulent misrepresentations as to her former husband's financial condition and ability to pay her a large sum of money due her for her own and her two minor children's support and main-

tenance; and inducing her to accept a nominal settlement thereof. The sum due was approximately $24,000 (Tr. 155, 435). The amount of damages awarded by the jury was $12,500, being segregated as $4,000 with respect to the wife's support, and $8,500 with respect to the support of the two minor children.

This action in tort was brought by Respondent in her own individual capacity and as guardian of her two minor children to recover damages caused by the fraud and deceit of the Defendant in inducing her to accept a settlement and secured her signature to a release dated March 17, 1935, by falsely and fraudulently representing to her that her ex-husband, Thomas McConnell, was without money or property to meet his large obligations for her own and her children's support. The obligations were the outgrowth of a property settlement agreement dated March 20, 1928, between Plaintiff and McConnell, her then husband, whereby McConnell agreed as part of a divorce proceeding to pay Plaintiff $150 for her support until she remarried, and $100 per month for the support of her two minor children until their majorities (Tr. 83). Large sums had accrued thereunder, and Plaintiff and her children went years without any support from Mr. McConnell, who inherited substantial wealth on March 6, 1935. Defendant, knowing of this substantial wealth, falsely and fraudulently represented to Plaintiff that McConnell was without funds or property with which to pay his obligations, and had borrowed a small sum of money $1,250, to pay to her for accepting that settlement and signing a release of a large sum of approximately $24,000. Plaintiff was injured and damages by the acceptance of this nominal settlement, and when she filed a claim against the Estate of McConnell (who died in 1936), for the money due for her own and her children's support, and such claim was disallowed through the defensive use of the fraudulently obtained release by the Defendant as attor-

ney for the McConnell Estate. Plaintiff has received nothing in the courts on these claims to date (Tr. 99, 100).

Plaintiff thereafter brought suit against the McConnell Estate to enjoin the use of the fraudulently obtained release in the Probate Appeal for a hearing *de novo,* which suit was brought in the Superior Court of Cook County, Illinois. In that case it was found that there was no fraud in the procurement of the release, and Plaintiff's claim for money due for the children's support was therein partially allowed after being halved in a King Solomon fashion, which the Court of Appeals referred to as "fireside Justice" (Tr. 437), because Plaintiff had an undisputed claim for approximately $24,000 then due. An appeal is still pending in that case, and to date Plaintiff has not received anything whatever in satisfaction of her claim or of that judgment (Tr. 99-100).

B.—QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT.

Defendant in his argument in support of his Petition herein presents four alleged grounds for this Court granting its discretionary Writ of Certiorari.

The real scope of his contentions are as follows:

I.

Defendant contends that, regardless of the proof of definite and real injury and damage in the acceptance of the nominal settlement and the denial of the claim in the Probate Court through his fraudulent conduct in obtaining the instrument of release, yet he is not liable for the damages incurred because the release is wholly illegal and no damages should have resulted from his fraudulent conduct.

II.

Defendant contends that the adjudications in the case brought by Plaintiff against the McConnell Estate to enjoin the use of the release in the Probate Court proceedings are properly pleadable in bar by him as *Res Adjudicata* on the questions of his fraud and deceit in this case, even though it is admitted that he was not a party to the other case or in privity with the Estate of McConnell, Defendant therein.

III.

Defendant contends that the Court of Appeals disregarded Illinois decisions affecting his alleged right to plead and introduce in *haec verba* the defensive pleadings in the Probate Court proceedings. This evidence was

prepared by him in another case and clearly a self-serving hearsay statement inadmissible in his own behalf. Its exclusion was proper under Illinois decisions, and of no prejudice to Defendant.

IV.

Defendant contends that the Court of Appeals disregarded applicable local decisions with respect to the District Court's instructions to the jury on the burden of proof in the case; but no such decisions are cited, and Illinois law supports the instructions given.

ARGUMENT.

I.

The Decision of the Court of Appeals Is Not in Conflict With the Decision of Another Court of Appeals or With Decisions of Courts of the State of Illinois With Respect to the Overruling of Defendant's Plea of Res Adjudicata.

The basis of Point I of Defendant's argument in support of his Petition herein is that the decision below was in conflict with the Eighth Circuit in the case of *Portland Gold Mining Co.* v. *Strattons, Ltd.*, 158 Fed. 63, and in conflict with the law of Illinois as expressed in the cases of *Anderson* v. *West Chicago R. R. Co.*, 200 Ill. 329, and *Lake Shore R. R.* v. *Goldberg*, 2 Ill. App. 228.

Respondent's contention is that the above cases cited by Petitioner are in complete harmony with the rule of *Res Adjudicata* announced by the Seventh Circuit in the case at bar which followed well established principles that such a plea is not available to a defendant unless he was a party to such other action in which the adjudication occurred, or was in privity with such person who was a party thereto.

Petitioner (hereinafter referred to as Defendant) complains that the Court of Appeals disregarded established principles of law sustaining the District Court's order striking from his defensive answer (Tr. 49-56) allegations to the effect that in a previous action brought by Respondents (Plaintiffs below) against the Administratrix of Thomas McConnell, deceased, in the Superior Court of Cook County, Illinois, to set aside and enjoin the use of the fraudulently obtained release. It was adjudicated therein that no false or fraudulent representations were

made to Respondent "to secure her *release* of the sum of $9,000 due and owing to her as alimony." (Tr. 55). Defendant, of course, has no hesitancy in first pleading these matters and then contending that plaintiff released nothing.

Contrary to Petitioner's contentions, the decision of the Court of Appeals below is not in conflict with the Eighth Circuit in the *Portland Gold Mining Case,* 158 Fed. 63, nor is it in conflict with the doctrine announced in *Anderson* v. *West Chicago R. R. Co.,* 200 Ill. 329.

The general rule of *Res Adjudicata* is that a judgment or decree of a court of competent jurisdiction, and the matters therein decided, is conclusive between the parties and their privies in any other action. The necessity for the identity of parties or privies is indispensable to the right to maintain the plea, and as to others such defense is unavailable.

See:

Litchfield v. *Crowe,* 123 U. S. 549.
Bigelow v. *Old Dominion Copper Co.,* 225 U. S. 111.

Our motion to strike this Plea of *Res Adjudicata* in the District Court was based upon the fact that the Defendant herein was not a party to such Superior Court suit nor was he in privity with the parties thereto, *i. e.,* the McConnell administratrix and heirs, and that such adjudication was therefore no bar to the action for damages against the fraud feasor in person. (Tr. 62).

Defendant, in his argument in support of his Petition herein, has repeatedly and recklessly stated that it was adjudicated in the Superior Court case that "he was not guilty of the fraud in question," inferring that his liability thereon was passed upon. There was no such adjudication pleaded, nor could there have been since he was admittedly not a party. His liability was not involved in

any way in that case as would enable him to plead the judgment as a bar to this action.

It is true that the evidence in the Superior Court case was substantially the same as here, with respect to the fraudulent nature of Defendant's representations in securing the release; but the mere fact that the evidence and the issues were the same is not controlling if Defendant was not a party thereto or in privity with the defendants herein.

Defendant cites as his chief case on Point I of his argument in support of his Petition, a decision of a trial court of New Castle County, Delaware, in the case of *Coca Cola* v. *Pepsi Cola*, 172 Atl. 260; which is the only case in point cited by Defendant, and which apparently stands for the proposition contended for herein by him; that Plaintiff has had one day in court against the McConnell Estate and now should not be allowed to pursue him for his own fraud. That decision, however, has no bearing upon the law of Illinois, and so far as can be determined was never even appealed to the Delaware high Court of Errors and Appeals. The doctrine announced therein is not good law, for it is well settled that merely because one has fully litigated his cause of action in a prior suit and has been defeated is of no avail in another suit in which a stranger to the first suit is a party involving precisely the same issues.

Old Dominion Copper Co. v. *Bigelow*, 203 Mass. 159, 206.

Keokuk R. R. Co. v. *Missouri*, 152 U. S. 301.

Crescent City Co. v. *Butcher's Union*, 120 U. S. 141, 155.

In *Fitch* v. *Stanton*, 190 Fed. 310 (C. C. A. 8), the general principles applicable to the rule of *Res Adjudicata* are stated as follows (page 314):

> "The essence of estoppel by judgment is that some right, question or fact in dispute between *parties* has been judiciously determined by a court of competent jurisdiction; and where such judgment is pleaded in

> bar of a subsequent action, the question is—*has such question been so determined between the same parties or their privies?*—and not upon what evidence was it determined, or the reason therefor." (Emphasis added.)

Because Defendant herein is interested in disproving the facts which were proven and determined in the Superior Court suit against other defendants is immaterial, unless he was a party or was in privity with parties to that suit; and the common interest in issues therein creates no privity with the Defendants in that case.

In the case of

> *Inhabitants of Sturbridge* v. *Franklin*, 160 Mass. 149,

the Supreme Court of Massachusetts said:

> "It creates no privity between two parties that as litigants in two different suits they happen to be interested in proving or disproving the same facts."

Defendant's contention under Point I of his argument in support of his Petition is based largely upon the assumption that a sort of privity exists between himself and the McConnell Estate. The cases he cites do not bear out his contention.

We have no dispute with the decisions cited by Defendant which hold that where an agent is first sued in tort and found not guilty, a plaintiff may not thereafter proceed against the principal, who liability, if any, is purely derivative; *i. e.* derived from his relationship to his agent on the doctrine of *Respondeat Superior* and not because of his own wrong. The law is clear that if the "wrongdoer agent" is first found to be not guilty in an action against him, the principal, because of his derivative liability, is in that sense in privity with the agent and may plead the Judgment as a bar. It does not follow, however, that a Judgment in a suit first brought against a principal to rescind a release for fraud should be *Res Adjudicata* as

to the agent who was not a party to the suit, for the agent's liability is the liability of an active *tort feasor,* and is not in any sense derived from his relationship to his principal.

That there is no general privity in this sense between an agent and his principal is well established. The general rule is stated thus in 34 Corpus Juris 1024:

> "Ordinarily, a judgment against the principal is not binding or conclusive on an agent who was not a party to the action."

Obviously, if it was not binding against him it cannot be used in his favor to escape trial for his own active fraud and deceit.

See:

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111.
Portland Gold Mine Co. v. *Stratton,* (C. C. A. 8) 158 Fed. 63.

Again the rule is stated in 24 Am. & Eng. Enc. Law, 2d Ed., page 747:

> "The fact that two parties as litigants in two different suits, happen to be interested in proving or disproving the same facts, creates no privity between them. * * * A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal."

In Freeman on Judgments (5th Ed.) par. 469, Vol. I page 1029, it is said:

> "Agents and principals, including, of course, masters and servants, do not, as such, have any mutual or successive relationship to rights of property. They are not in privity with each other. Consequently, the principal or master is not bound by the judgment obtained in an action by or against the agent or servant and vice versa. * * *
>
> "But when it is held, as it has been, that a judgment

in favor of the principal in action against him for the fraud of his agent is *res adjudicata* in favor of the latter when sued for the same fraud, the only possible basis for such a ruling is the broad ground that the principal and agent represent each other in all litigation based on the agent's acts whether tortuous or otherwise. Such a position is obvious untenable and contrary not only to the principles already stated in this section but opposed to the rule that a judgment in favor of one joint *tort feasor* is not a bar to an action against another, at least when he has no right to indemnity and also violates the principle of mutuality, since a judgment against the principal would not in such case bind the agent or servant."

The author cites the case of *Krolich* v. *Curry*, 148 Mich. 214, as opposed to this view, which case he criticizes severely and says that it was based upon the case of *Emery* v. *Fowler*, 39 Me. 326, also cited by defendant herein, as persuasive authority for reviewing the Court of Appeals of the Seventh Circuit.

The Illinois cases cited by Defendant in support of his plea of *Res Adjudicata* are no authority for the proposition that adjudications in favor of a principal, who was not an active wrongdoer, and whose liability, if any, is purely derivative, may be a bar to a suit against an active wrongdoing agent, and are not in conflict with the decision of the Court of Appeals below.

The case of *Lake Shore Railway* v. *Goldberg*, 2 Ill. App. 228, cited by Defendant, was an Action of Trespass against a railroad company which pleaded that the Plaintiff had previously sued both it and its agent C, for the identical trespass which had been performed by C alone as the agent of the railroad company; that in said case C was found not guilty, and the railroad company was dismissed. In sustaining the plea as a bar to further action against the railroad company the Appellate Court said at page 228:

"* * * We take the substance of this averment to be that the liability of Appellant was claimed to have

> arisen, and if there was any, must have arisen solely from its relation as principal to the said Cornwall, whose acts * * * constituted the trespass complained of."

And again at page 234:

> "But where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be."

This case is no authority for the converse of the proposition contended for by Defendant, that he, the real actor, should be held not guilty because of prior adjudications in a different suit against his non-acting principal. In the Lake Shore Railway case, the principal could be liable only in a derivative sense if the agent was, in that its liability was based solely upon *"Respondeat Superior"*, and since the agent was found not guilty in a case against him, the principal cannot be liable because his liability, if any, is derived from the agent. While in the case at bar Defendant is sought to be charged as an active fraud feasor, for his own wilful fraudulent acts, and not because of his agency relationship with another. It is clear that Defendant's liability is not derivative from either McConnell or the McConnell Estate, and he can claim no privity thereto.

The other Illinois case cited by Defendant, under Point I of his argument in support of his Petition, *Anderson* v. *West Chicago Railway*, 200 Ill. 329, is in complete harmony with the well settled principles of law adopted by the Court of Appeals below, for in that case the active wrongdoer was first found not guilty in a suit against him and therefore the lessor, whose liability, if any, was purely vicarious, was properly freed on a plea of *Res Adjudicata*. It must be noted that there was an element of undisputed privity between lessor and lessee, and the Illinois Court's use of the term "principal and agent" is in reference to

that relationship. It also appears that the lessee, who was later sued, had previously undertaken to conduct the defense of the lessor.

The decision of the Court of Appeals of the Eighth Circuit which Defendant contends is in conflict with the decision below is in fact in complete accord with such decision and our own arguments herein. That case, *Portland Mining Co.* v. *Stratton,* 158 Fed. 639 (C. C. A. 8), was a suit for damages in trespass. The defendant, a principal in the transaction, and another through whom the defendant had acted were first sued. The immediate actor was exonerated on a direct verdict, and it was held that since the one who committed the trespass, if any, was exonerated, the defendant-principal should also be, and the court pointed out that there was privity between the actor and the defendant in the trespass, in other words, the defendant was liable only if the actor was. Justice Van Deventer, who wrote the court's opinion said, page 65:

> "The objection urged against it (estoppel) now and heretofore are (1) that, as the responsibility of joint *tort feasors* is several as well as joint, one may be exonerated and another held culpable; and (2) that one may not have the benefit of an adjudication as an estoppel, unless he would have been prejudiced by it had it been the other way. But it is quite generally held that these objections do not prevent an estoppel *where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think upon principle this ought to be so.*"

We see no comfort to Defendant in the above undisputed principle of law, and we see no conflict with the decision of the Seventh Circuit below. Defendant's counsel has artfully contrived to interpret the language of that decision as fitting his case. An examination of that opinion will dispel the befuddled arguments of Defendant's Petition.

It requires no citation of authority to illustrate the privity

which exists between grantor-grantee, mortgagor-mortgagee, assignor-assignee, lessor-lessee, etc. An agent does not bear such relationship of privity under all circumstances from his principal. The agent is not liable in tort because he was an agent of another in privity thereto, but rather because he himself was a wrongdoer. He is liable for his own torts and his liability is neither decreased nor increased by his own agency or his principal's conduct. There is no vicarious liability on the part of the agent from his principal, there is such liability on the part of the principal from his agent, and in this sense only there is privity between them.

The distinction is recognized in many decisions, and is clearly illustrated by the statement of the Illinois Supreme Court in the case of:

Feitel v. *Chicago City Railways Co.*, 211 Ill. 279,

wherein the court held that a motorman-agent had no interest to disqualify him as a witness in a suit against his employer, for the reason that a judgment for or against the principal is not conclusive on the agent. In discussing this question the court said, page 287:

> "If the direct legal effect of a judgment will be to establish a claim against the witness, he has a direct interest in the event of the suit within the meaning of the statute. But that can only be where the judgment will be evidence against the witness of his liability. As already shown a judgment against the defendant in this case would be no evidence, in a suit against the motorman, that he had been negligent or that such negligence was the cause of the accident."

and again, page 288:

> "If the witness should be subsequently sued by the plaintiff for the same wrong, the judgment would be neither evidence for nor against him. He would not be relieved of liability by the judgment."

We feel that the *Feitel* case rather than *Anderson* v. *West Chicago Railway*, 200 Ill. 329 cited by Defendant is

in point on the question involved, and is in complete harmory with the decision below.

In the case of *Cragin* v. *International S. S. Co.*, (C. C. A. 2) 15 Fed. (2d) 263, "P" sued to recover broker's commission against a steamship company on charter. "P" offered to show that on previous occasion an agent of the defendant sued on charter *vs.* the plaintiff, and recovered. "P" then argued that defendant was estopped of record to deny that "P" was chartered. The Court in holding there was no "estoppel by judgment" said, page 264:

> "Now assuming that the suit was lawfully brought, the judgment *per se* binds only parties and privies. This defendant was no party, and there being no mutual or successive relationship to property rights between agents and their principals, defendant was not in privity with Suzuki."

An agent active wrongdoer may not plead as a bar as *Res Adjudicata* a Judgment or matters adjudicated in an action first brought against his principal, is well settled throughout the land.

See:

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111.
Bigelow v. *Old Dominion Copper Co.*, 203 Mass. 159, 206, (89 N. E. 193).
Cragin v. *International S. S. Co.*, (C. C. A. 2) 15 Fed. (2d) 263.
Thornton v. *Columbus Gas Co.*, 18 Ohio St. Pns. 158, 160.
Carey v. *Conn*, 107 Ohio St. 113 (140 N. E. 643).
Myers' Adm. v. *Brown*, 250 Ky. 64 (61 S. W. 2d 1052, 1054).
McFaddin Co. v. *Texas Rice Land Co.*, 253 S. W. 916, 928.
Sutter v. *Kansas City*, 138 Mo. App. 105, 119 S. W. 1084 (Kan.).
American Express Co. v. *Des Moines Bank*, 146 Iowa 448 (123 N. W. 342).

The principle is most lucidly stated by the Court of Civil Appeals of Texas in the case of:

McFaddin v. *Texas Rice Land Co.*, 253 S. W. 917, at 928,

as follows:

> "We do not come to the position of Weiss and Kyle with reference to their pleas of estoppel on account of the former judgment, in favor of McFaddin. The general rule is that where the cause of action is forwarded upon a tort, a judgment without satisfaction against one of two trespassers is not a bar to another action against the other for the same trespass, and that a judgment adverse to the plaintiff in a suit against one of two joint *tort feasors* is not a bar to a suit against the other. *But there is a well defined and established exception to this rule where the immediate actor, or active wrong-doer, has been sued and a judgment has been rendered in his favor.* In such case the plaintiff cannot recover against the other who has not participated in the trespass. This doctrine has particular application to such relations as principal and agent, master and servant, and whenever one of the parties is bound, not by any fault of his own, but derivatively through the act of another." (Emphasis added.)

The court in that case then reviews practically every authority cited by the defendant herein.

In approaching the question involved, this court's attention is respectfully directed to the fact that the complaint herein charges the Defendant with being the actual fraud-feasor. He is charged with liability for his own active and wilful fraud and deceit in depriving a helpless mother and two minor children of their rights to parental support. His liability, if any, is based upon his own acts, and not derived from any relationship which he bears to another. He has no vicarious liability such as a principal might have for the conduct of his agent within the scope of his authority, and, accordingly, he as the active wrongdoer has no privity

with the McConnell Estate upon which to base his plea of *Res Adjudicata.*

For an additional reason, this defendant cannot claim privity with the defendants in the Superior Court action, and that is because there is no privity between him and the McConnell Estate, as such.

The decision of the Massachusetts court in the *Bigelow* case, above cited, reported in 203 Mass. 159 (40 L. R. A. N. S. 347), the Court said, page 219:

> "For another reason the New York Judgment in favor of Lewishan seems not to be a bar. The joint actor with the defendant was not the defendant in the New York suit, but it was prosecuted against his executors. If it be assumed that there is a kind of privity between the two who acted in concert, that privity was broken by the death of one. There is no privity between Lewishan's executors and Bigelow."

From the authorities above and from the nature of the allegations of the complaint that this defendant was the active fraud feasor, we respectfully submit that there was no such privity of estate or liability with the McConnell Estate in the Superior Court action as to make that judgment on the matters therein determined to be *Res Adjudicata* of this action. This defendant being charged as an active tort feasor has no privity with his client-principal except as a joint tort feasor, under the decision in *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, and the plea of *Res Adjudicata* contained in defendant's answer was properly stricken.

II.

The Decision of the Court of Appeals With Respect to the Question of the Validity or Invalidity of the Release Is in Conformity With Applicable Local Illinois Decisions and Was Not in Conflict With Any Decision of Any Other Circuit Court of Appeals.

Under Point II of his argument in support of his Petition, Defendant argues that the decision below is in conflict with a decision of another Circuit Court of Appeals with respect to its ruling that the question of the validity or invalidity of the fraudulently obtained release could not be raised by the Defendant. He, however, neglects to cite any Court of Appeals decision supporting his contentions in this regard. The weakness of Defendant's argument is illustrated in an examination of his oft repeated assertion in his argument that "it was imperative that Plaintiff establish that the release was valid."

Such an argument is in direct conflict with well established principles of local Illinois law in decisions of the Illinois courts in cases of fraud and deceit.

We cannot fail to point out to the Court the hypocrisy of Defendant's position in urging in this case that the fraudulently obtained release was invalid and therefore should be determined to have caused no damage or injury to Plaintiff, when the undisputed record in this case is that this same Defendant as counsel for the McConnell Estate caused Plaintiff to accept a nominal settlement and thereafter used the fraudulently obtained release to bar Plaintiff's claim in the Probate Court of Cook County for alimony, and support money for her children (Tr. 156-7), and that to date, not one cent has been recovered by Plaintiff on her claim for approximately $24,000.00 (Tr. 100).

Defendant's argument that the legal question as to the validity or invalidity of the instrument of release is an

essential part of Plaintiff's case is not accepted law, for it is well settled that such an issue is not an essential one herein where other direct and conclusive evidence of injury is established: *i. e.* Plaintiff's acceptance of a nominal settlement, the denial of the Plaintiff's claim in the Probate Court by defensive use of the release, and Plaintiff's inability to collect anything to date on her claim.

An analysis of Defendant's motion to dismiss which attacks the validity of the instrument of release reflects repeated assertions that "the instrument of release cannot be made the basis of any claim for damages" (Tr. 23, 24).

It seems too plain for argument that the fraudulently obtained instrument of release is not the basis of this action as contended by Defendant. The real gist of the action is the fraud and deceit, and the injury caused thereby. As succinctly stated by the court in the case of:

Chanin v. *Chevrolet,* (C. C. A. 7) 89 Fed. (2d) 889, at 891:

> "An action of deceit to recover damages for fraud inducing the making of the contract *is not based upon the contract but upon the tort.* 27 C. J. 16."

Thus, Plaintiff need only allege and prove the essential elements of fraud and deceit, including injury or damage, to sustain her case. The release, or its legal effect, is not the basis of the case, as urged by Defendant; and the Defendant may not escape liability by urging as a matter of abstract law that no injury should have resulted, in that the release obtained by his fraudulent conduct should never have been a bar to Plaintiff's claim against the McConnell Estate because such release was invalid.

Naturally, we should have been pleased to accept Defendant's present legal arguments in the Probate Court of Cook County at hearing on the claims, but there Defendant in person, as attorney for the McConnell Estate successfully asserted the validity of the release as a bar to such claims (Tr. 156, 157). The injury and damage al-

leged and proved is not one of legal theory, (bordering on sophistry) but one of cold hard fact.

When an adjudication is properly admissible as was the proof of injury by the denial of the Probate claim, it is conclusive and final under Illinois law even if an appeal is pending.

See:

Moore v. *Williams,* 132 Ill. 589.

The Court of Appeals correctly construed the law applicable, and refused to consider the plea of the fraud feasor which would allow him to derive a direct benefit from his own acts of fraud and deceit (Tr. 439-40).

See:

Mutual Life Ins. Co. v. *Armstrong,* 117 U. S. 591.

If Defendant felt that the instructions given by the District Court, and assented to by him, did not completely cover every element of damage in the case, then appropriate exception should have been taken, and further instructions tendered for the court's consideration. Under the state of the record, he cannot now be heard to complain.

Penn. R. R. v. *Minds,* 250 U. S. 368, 375.
Mobile R. R. v. *Jurey,* 111 U. S. 584, 596.

As a matter of law the issue of the validity or invalidity of the instrument of release is not a question which the Illinois courts allow a fraud feasor defendant to raise.

In the case of *Tate* v. *Watts,* 42 Ill. App. 103, where an action for fraud and deceit was brought by the purchasers of land against the seller, the defendant contended there was no injury or damage and entered several pleas to the effect: (1) that the contract for the sale of the land was not in writing and signed by the seller in violation of the statute of frauds and perjuries, and (2) that the deed conveying the land to the plaintiffs was void for defects in conveyancing and therefore conveyed no title.

As to the first plea of illegality of the instrument, the court said: (page 105)

> "The cause of action set out in the declaration does not admit of such a defense. It is not based upon a contract conveying real estate not to be performed within a year, nor is appellant charged upon any contract of that kind. *The gist of the action is fraud and deceit.* It has nothing whatever to do with the Statute of Frauds. The statute was intended to guard against the danger of fraud and perjury being committed in the establishment of contracts concerning land running longer than one year, *but not to protect persons against tortious acts, and misrepresentations where others are* injured thereby" (emphasis added).

On the second point that the deed was void and there was therefore no injury, the court said at page 107:

> "There is a point made by appellant that the deed from Peterson for the land in Henderson County, Illinois, was made out in blank, the names of the grantees not being filled in at the time * * * and that the deed for that reason was void and conveyed no title.
>
> "Hence it is inferred that the appellees have no right of recovery in this action. It is difficult for us to see how this could injuriously affect appellees' right of recovery."

As pointed out by the Illinois Court, the gist of the action is fraud and deceit, and it does not avail the tort feasor to urge that the deed given (or received) was invalid for any reason.

If pecuniary loss occurs, it is the basis of a recovery, and the theoretical invalidity of the release executed at the time of the fraud is no defense to the action for damages due to the fraud. The law which Defendant urges on the invalidity of the releases was intended to protect helpless women and children collect their proper support from a divorced parent, not to aid a fraudulent minded lawyer to seal their loss by his fraud.

See also:

Solonemsky v. *Zevin*, 267 N. Y. Supp. 589 (App. Div.).

Rosenfield v. *Rosenfield*, 2 N. Y. Supp. (2d) 107.

Lindley v. *Kemp*, 76 N. E. 798, 803 (Ind. App.).

Under the circumstances, the court correctly instructed the jury with respect to the measure of damages. The release itself recites that provisions "for the support of the party of the first part or the children of the parties hereto, is hereby cancelled" (Tr. 93). Thus the release purported to expressly cancel the full obligation. And Defendant so pleaded it in the Probate Court (Tr. 43).

Defendant makes some reference under Point II and more extensively under Point III of his argument in support of his Petition, to the state of the trial record with respect to his attempt to plead in his answer portions of the defensive pleadings in the Probate proceedings on the Plaintiff's claim, inferentially stating that he was seriously prejudiced by the striking of such matter from his answer and its exclusion from evidence, contending that such hearsay evidence would tend to prove that the Probate Court did not act on the release.

The ruling of the District Court was squarely in line with the well established law of Illinois, in excluding such immaterial and collateral evidence, which was also self-serving hearsay:

See:

Ivanhoe v. *Buda Co.*, 247 Ill. App. 336, 341;

Under well settled decisions a trial court has a wide range of discretion in the admission or exclusion of evidence on a collateral question, particularly where, as here, it could not set up any defense to the issues.

See:

United States v. *Socony Oil*, 310 U. S. 150, 310.

Reeve v. *Dennett*, 145 Mass. 23, 28.

Defendant also contends that the record discloses the claim in the Probate Court was denied for failure of proof of the sum due, and not because of the release. Such an argument is utter nonsense in view of the record and the law involved. The offer of Defendant's Exhibit G (Par. 7, Tr. 33), a portion of the defensive pleadings in the Probate Court, was properly rejected by the court in view of the law as announcned in the case of *Ivanhoe* v. *Buda Co.*, 247 Ill. App. 336, 341. Defendant's Exhibit G is not in terms a denial of the accrual of any sum under the McConnell property settlement agreement dated March 20, 1928, which contract (Plaintiff's Exhibit 1, Tr. 79-85) clearly created an obligation on McConnell from March, 1928, to his death in June, 1936, of approximately $24,000.00 for the support of his ex-wife and two minor children during that period.

It is a well settled Probate law of Illinois that when a debt arises from a contract or judgment, which is conclusive, and a claim is filed against the estate of a decedent thereon, any payment of the claim contended for is a pure defense and must be established by the executor.

See:

Andrews v. *Votaw*, 240 Ill. App. 311, 322.

Defendant's crafty attempt to shirk the burden of proof by the language employed in Defendant's Exhibit G, cannot be now made the basis of an argument that he could have shown thereby that the Probate Court denied the claim for failure of proof of the amount due rather than by his use of the fraudulently obtained release to bar the Plaintiff's otherwise conclusive claims. The obligation as the basis of the claim was conceded by the Probate objection (Tr. 42-3) therefore any payment or credit thereon would be defense thereto to be established by the Executor. As a matter of fact, the record is clear that the Probate Court acted solely on the release on Defendant's claim

that it was a bar to the claim (Tr. 157). Defendant's answer shows that it was so pleaded by him in the Probate Court (Tr. 43, 48). How then should he be heard to argue that such injury and damage as have occurred should not have occurred because the release was invalid? Such hypocrisy should not go unlabeled, and his contentions in this respect are without merit.

III.

The Decision of the Court of Appeals With Respect to the Exclusion of the Probate Objection Was Not in Conflict With Applicable Local Decisions.

Under Point III of his argument in support of his Petition Defendant has inserted the heading that the Court of Appeals decision below decided "an important question of local law *probably* in conflict with applicable local decisions." Defendant does not point out the important question presented. In fact, it is a most collateral question of evidence and pleading strictly in conformity with courts of Illinois and other jurisdictions.

The striking of the Probate objections (Tr. 63) and the exclusion of a limited portion thereof as evidence at the trial (Tr. 353) was in complete conformity with an applicable local decision in the case of *Ivanhoe* v. *Buda Co.*, 247 Ill. App. 336, 341, as pointed out under Point II herein, *ante*. Both the District Court, and the Court of Appeals correctly followed the rules of evidence announced therein. It would serve no useful purpose to answer at length the Defendant's ponderous arguments in this regard. Much of what we have said under Point II, *ante*, is applicable hereto and is hereby adopted.

Nothing that Defendant pleaded or offered in evidence would have tended to shed any light on the reason why he now contends the Probate claim was disallowed. The rec-

ord is conclusive that it was because of the release (Tr. 48, 157); and Defendant, himself on the witness stand, gave no testimony whatever as to what transpired at the hearing in the Probate Court on Plaintiff's claim.

IV.

The Opinion of the Court of Appeals Was Not in Conflict With Any Applicable Local Decision With Respect to the Instruction on the Burden of Proof.

Again, Defendant asserts that the Court of Appeals opinion was "probably" in conflict with an applicable local decision with respect to the charge to the jury that Plaintiff must prove the issues by a preponderance of the evidence to the satisfaction of the jury instead of the requested "clear preponderance" or "clearly to the satisfaction of the jury".

The Court of Appeals reviewed all the Defendant's instructions tendered and refused and stated, 117 Fed. (2d) at page 680:

> "The court fairly and fully instructed the jury upon this subject matter and the nice gradations attempted to be framed by the defense in the instructions tendered would have only confused the jury. The instructions given properly interpreted the law of fraud and deceit, and the burden of proof in actions therefor."

The District Court did properly and fairly instruct the jury as to the burden of proof: (Instruction 12, Tr. 371, 372), and correctly charged the jury as to the burden of proof with respect to the issues on the elements of fraud, (Instruction 21, Tr. 374, 375) to the giving of which Defendant took no objection.

The law does not require Plaintiff to prove her case by a "clear" preponderance of the evidence. All that is

required is that she prove the elements of fraud by a preponderance or greater weight of the evidence.

See:

Merchants Bank v. *Lyon,* 185 Ill. 343, 354.
Mortimer v. *McMullen,* 202 Ill. 415.
Endsley v. *Johns,* 120 Ill. 469, 721.
Miller v. *Steel,* 153 Fed. 714, 721 (CCA).
Crane v. *Shaefer,* 140 Ill. App. 647.

The quoted extract from the Illinois case cited by Defendant may not be urged as requiring such instruction as was tendered by defendant be given to a jury on the burden of proof rule. That case has no application to the point on which Defendant urges it as authoritative.

It is respectfully submitted that the District Court's instructions were entirely without error in respect of the matters complained of by Defendant.

Conclusion.

Space does not permit a full discussion of the fraudulent nature of Defendant's transaction in securing the release from Plaintiff. None but trivial and technical defenses were raised in the courts below. And the so-called "important" questions are raised on such defenses to secure escape for a cheat and a fraud. The Court of Appeals opinion reflects a thorough and learned discussion of the issues involved, none of which suffice this court granting its Writ of Certiorari.

We therefore respectfully ask that Petitioner's application for a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS DODD HEALY,
BERNHARDT FRANK,
Attorneys for Respondent.
208 So. La Salle St.,
Chicago, Illinois.

(22)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 923

HENRY V. McGURREN,
Petitioner-Defendant,
vs.

GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,
Respondent-Plaintiff.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES H. SOELKE,
Counsel for Petitioner-Defendant.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion decided an important question (principle) of law in a manner which conflicts with decisions of other United States Circuit Courts of Appeal and which conflicts with decisions of courts of the State of Illinois in reference to res adjudicata.

Under point "I" commencing on page 6 of respondent's brief in opposition to the petition for writ of certiorari,

she attempts to negative petitioner's above contention. On page 8 of her brief, it is admitted that the evidence in the Superior Court case was substantially the same as the evidence in this case with reference to the alleged fraudulent, deceitful representations, and thereby respondent admits that in another proceeding brought by her in a court of her choosing, the success of which depended upon her proving the self-same fraudulent, deceitful representations alleged in this proceeding to have been made by this petitioner, she was denied the relief prayed for because the court found that this petitioner had not been guilty of said fraudulent, deceitful representations and that the release in question was not obtained from respondent by reason of any such alleged deceitful representations.

As indicated, this was an adjudication against respondent in a tribunal selected by her in a proceeding in which she attempted to rescind the release in question predicated on the theory that it was obtained by said fraudulent representations. Respondent makes no contention that there was any evidence of any kind or character that she presented at the trial of this case which she was unable to or did not present in the Superior Court case or that the evidence presented in this case was any different from that presented in said Superior Court case.

Petitioner has shown to the court that as a matter of law one who was not a party to a prior suit may properly take advantage of a finding in said prior suit against his adversary in a subsequent suit wherein such party is his adversary, and this although there may have been no privity between the defendant in the second suit and the parties to the first suit.

Respondent refuses to recognize the principles set forth in the various cases cited by petitioner, in that she maintains that in no case can a party take advantage of a find-

ing of fact in a prior adjudication unless there was some form of privity or mutuality between the parties. It is interesting to note that not in a single case cited by respondent did the court hold that the doctrine contended for by the petitioner would not apply to a case such as the one before this Court; for in every one of the cases cited there is either a total disregard of the principle of public policy based on the maxim of "*interest republicae ut sit finis litium,*" or the opinions are based upon cases against a tort feasor who might be guilty of the tortious acts attributed to him irrespective of the fact that some other person or persons may have been accused of being a tort feasor or a joint tort feasor in a prior proceeding and have been found not guilty.

Respondent admits that the courts of Illinois and other courts universally recognize that when an agent is sued for damages resulting from tortious acts attributed to him and has been found not guilty, his principal may plead such adjudication in a subsequent suit against the principal by the same plaintiff for the recovery of damages predicated on the doctrine of *respondeat superior.* If such is the case, then why is not the reverse good law: that is, when a principal has been sued and when in order to establish the cause of action it is necessary to show that his agent has been guilty of certain tortious acts and the plaintiff fails to recover against the principal because he cannot establish that the agent has been guilty of the tortious acts attributed to him, why should not the agent be entitled to plead that in the prior suit against his principal the said agent had been found not guilty of the tortious acts attributed to him, although he was not in any way a party to the prior proceeding or in privity in any way with the plaintiff? That the courts recognize the soundness of the reverse principle is established by the cases cited by petitioner.

We have pointed out that there is nothing to show that McConnell was a joint tort feasor with petitioner; but, even if it could be shown that he were, we have further pointed out that McConnell could not have been the active tort feasor as he was not present at the time of the commission of the active torts complained of in both proceedings and had nothing to do with the same and so petitioner has brought himself squarely within the principles of law enunciated in the cases of *Portland Gold Mining Co.* v. *Stratton's Independent Ltd., et al.,* 158 Fed. Rep. 63; *Anderson* v. *West Chicago St. R. R. Co.,* 200 Ill. 329; and *Emery* v. *Fowler,* 39 Me. 326, and other cases cited by him.

On page 8 of her brief, respondent has cited the case of *Keokuk R. R. Co.* v. *Missouri,* 152 U. S. 301, and *Crescent City Co.* v. *Butcher's Union,* 120 U. S. 141, 155. These cases are distinguished in the Petition for Rehearing, which is in the record before this Court (Tr. 460) to which this Court is respectfully referred where we also commented on *Bigelow* v. *Old Dominion Copper,* 225 U. S. 111, 128, which is an appeal from a Massachusetts decision. We wish, however to further comment on the latter case. We note that the latter portion of that case says, page 128:

> "It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in cooperation with Lewisohn. The liability of each was several as well as joint, and a failure to recover against one is no bar to a suit against the other on the same facts."

This primarily is the gist of the above cited case, and it has no application to the case before the court. In other words, in the cited case, both Lewisohn and Bigelow were charged with being guilty of certain fraudulent acts. One

might have committed the act and the other might not have; one might be guilty for some reason of the act and the other might not be. But in the case before the Court, McConnell could not be guilty of the acts unless this defendant was. As we have pointed out a number of times, plaintiff has never shown that McConnell was a joint tort feasor with this defendant, but it has been established that defendant was the agent of McConnell. Again, the cited case says something about there not being any privity between the estate of Lewisohn and Bigelow, or between Lewisohn's executors and Bigelow. That case was decided upon the Massachusetts law, if that is the Massachusetts law, and it is not binding on this court. However, we submit that the law in that case should not be followed in this case for the reason that under the facts in the cited case, Lewisohn, who was sued in the New York court, could have been found not guilty of the acts attributed to him and yet Bigelow could have been guilty; while, in the case before the court, had suit been brought against McConnell in his lifetime predicated on the same theory as plaintiff started her suit in the Superior Court, it would have been brought on the theory that this defendant had perpetrated the deceitful acts, not that McConnell had perpetrated them or that he was a joint tort feasor, and a decision in favor of McConnell could have been pleaded by this defendant. Plaintiff now contends that because the action in the Superior Court upon which she prayed for relief predicated on the alleged deceitful and fraudulent acts of this defendant, was against the estate of McConnell, the decision against her in said case cannot be pleaded by this defendant. This is very strange legal logic; and if that is what the Massachusetts court said, then we respectfully submit that it is not good law. As far as the Supreme Court of the United States is concerned, that being the Massachusetts law, the

Supreme Court was bound to follow it. However, there was another very interesting proposition and one which carried a good deal of weight with the Massachusetts court in making the seemingly fine distinction that it did. An examination of the Massachusetts case, *Old Dominion Copper Co.* v. *Bigelow,* 203 Mass. 159, and the Supreme Court case, *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, shows that the New York judgment in favor of Lewisohn which was pleaded by Bigelow in the Massachusetts case, was not a judgment on the merits or a finding of fact at all. It was a judgment dismissing the proceeding in the New York Court predicated on a demurrer. That is, there was no finding of fact in the New York case that Lewisohn had not been guilty of the tortious acts attributed to him. Therefore, we have two very definite distinctions between the two cases and the instant case: first, that Bigelow might be guilty even though Lewisohn was not guilty; and second, that the judgment which was pleaded by Bigelow as estoppel or *res judicata* in the Massachusetts case was not a judgment or finding that Lewisohn had not been guilty of committing the tortious acts which it was necessary for him to commit in order to hold Bigelow liable and the case was not decided on the merits. There was no hearing and neither a court nor a jury determined or made a finding as to whether or not Lewisohn had in fact committed the tortious acts attributed to him.

Respondent, on page 10 of her brief, cites from Volume 24, American and English Encyclopedia of Law, 2nd Edition, page 747; but we find on reading further in the text that the authority recognizes the principles contended for by petitioner, for we find the following at page 752 of the same volume, edition, and subject matter:

> "Thus a judgment under the merits for the defendant in an action against the principal or master for

> the wrongful act or the negligence of his agent or servant is conclusive against the plaintiff in a subsequent action by him against the agent or servant."

Further, under (3), the same authority says:

> "Rationale of Rule—The application of the principle of *res judicata* to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations. But other authorities deny the existence of such privity, and hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies."

Wherefrom it appears that the petitioner should have been allowed to plead the findings of fact set forth in the Superior Court decree to the effect that the petitioner had not been guilty of the fraudulent deceitful representations attributed to him, being the same deceitful fraudulent representations attributed to him in this proceeding, and thereby establish an issue which would enable him to produce evidence to that effect, so that he might have the benefit of the finding of fact in respect thereto made against the respondent in said Superior Court proceeding; and as pointed out on page 27 of the original brief, the ruling of the Circuit Court of Appeals to the effect that the petitioner could not plead and introduce evidence of such decree in the Superior Court was in that respect in conflict with the decision of another United States Circuit Court of Appeals and was in conflict with the decisions of the State of Illinois.

II.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of another Circuit Court of Appeals on the same matter in that the finding of the reviewing court, that the validity of the Release is immaterial, is tantamount to a determination by the reviewing court that the instruction in reference to the measure of damages given to the jury, although without objections or exceptions thereto, but in fact with the consent of Plaintiff thereto, was not the law of the case for the purposes of said appeal.

Respondent answers petitioner's contention above, under "II" of her brief, commencing on page 18, captioned as follows:

> "The Decision of the Court of Appeals with Respect to the Question of the Validity or Invalidity of the Release Is in Conformity with Applicable Local Illinois Decisions and Was Not in Conflict With Any Decision of Any Other Circuit Court of Appeals."

Respondent states that "the weakness of Defendant's argument is illustrated in an examination of his oft repeated assertion in his argument that 'it was imperative that Plaintiff establish that the release was valid' "; and on page 24 says, "How then should he be heard to argue that such injury and damage as have occurred should not have occurred because the release was invalid." Respondent goes into a lengthy discussion to the effect that the gist of the action was one of fraud and deceit. This has never been denied by petitioner. Neither has it been contended at any time by petitioner, assuming the respondent established the fraud and deceit alleged, that the instruction with respect to general damages (Instr. 20, Tr. 374) was not correct.

On page 20 of her brief, respondent apparently attempts to confuse the issue by suggesting that petitioner is now objecting to the instruction of the court given to the jury in respect to general damages. At no time did the petitioner object to such instruction. On the contrary, petitioner at all times has called attention to the fact that that instruction was binding, not only upon the respondent but also upon this petitioner and the reviewing court.

Respondent on page 22 of her brief refers to the instruction in reference to general damages set forth in petitioner's brief, page 41, and there again admits that it was a proper instruction. The position of petitioner is that by reason of that instruction the only damages that could be considered by the jury were the difference between what she received under the release in question and the value of the right or claim surrendered, canceled, or released under the terms of the release at the time and place of the execution of the release. This instruction, as indicated, became the law of the case and no other measure of damages could possibly be considered and all other measures of damages were excluded from the jury: that is the jury could not take into consideration anything that happened in the Probate Court in arriving at what damage, if any, was suffered by respondent by reason of the execution of said release. The instruction excluded from the consideration of the jury all other elements of damage. Respondent did not see fit to ask that the court instruct the jury that as a further or other element of damage the jury might consider what, if anything, plaintiff had been barred from recovering in the Probate Court by reason of the execution of said release; and clearly the reason no such instruction was asked for was, as has been pointed out, due to the fact that neither the respondent nor the court felt that what transpired in the Probate Court was in fact an element of damage to be considered by the jury. As has

been stated, the petitioner is not complaining of the instruction and believes that the instruction did set forth the proper measure of damages, and therefore says that when the Court of Appeals found that the validity of the release was immaterial that such finding was tantamount to holding that said instruction did not constitute the law of the case for the purpose of review.

Under the instruction, the question of the validity or the invalidity of the release became one of paramount importance for the reason that if the release was invalid so that it did not release the rights of plaintiff-sole and/or of plaintiff-guardian under the Property Settlement Agreement incorporated in the decree of divorce, then the respondent suffered no damage.

Petitioner in his original brief filed in the Circuit Court of Appeals, carefully pointed out the necessity, under the instruction given, that the release be valid in order to have caused damage, and in Point II of his petition for rehearing (Tr. 450) he renewed his contention that under the instruction in question the reviewing court was bound to hold that that instruction was the law of the case and could not therefore find that the validity of the release was immaterial when considered in connection with the measure of damages. We respectfully request this Court to examine said portion of said petition for rehearing.

It must at all times be borne in mind that this is not a discussion of the effect of the validity or invalidity of the Release in relation to the question of liability, but is a discussion of the effect of the validity or efficacy of the Release to cause damages to Plaintiff-sole or Plaintiff-guardian's wards, both or either of them as the case may be, because it constituted a legal and binding release of their rights, or the rights of either of them as the case

may be, under the Property Settlement Agreement, and if it was not legal or binding as to them or either of them, that is, plaintiff-sole or plaintiff-guardian, then as to said party or parties, as it was not legally binding, it could not and did not release any claim or right or surrender or cancel any claim or right of them or either of them as the case may be in the Property Settlement Agreement incorporated in the decree of divorce; and if no claim was cancelled, surrendered or released by them or either of them by reason of the release, then plaintiff-sole or the wards of plaintiff-guardian could suffer no damages, as they or either of them could only recover damages, under the following formula, that is, the difference between the fair and reasonable value at the time and place in question of the claim or right surrendered, cancelled or released by plaintiff under the terms of the release and the amount paid thereunder. The trial court clearly considered that the validity or invalidity of the release was of paramount importance in respect to the determination as to whether damage had been suffered by plaintiff-sole or by the wards of plaintiff-guardian, for he instructed the jury, over the objection of the plaintiff, as follows (Tr. 369):

> "As a matter of law, a guardian has no right to surrender, release, or cancel the claim of this ward or any of its wards against another person, for any sum of money whatsoever, without first the consent thereto of the court of jurisdiction over such guardian and such minors, and any release executed by such guardian of said minors without such consent is wholly void and invalid as a matter of law."

This was clearly a proper instruction to give, even over the objection of counsel for plaintiff, when plaintiff had specifically herself indicated that the basis for determining whether plaintiff-sole or plaintiff-guardian had suffered any damages was as set forth in Instruction 20 (Tr. 374) heretofore discussed and pointed out in our original brief and in this brief.

III.

The United States Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in respect to the establishment of claims in the Probate Court in the State of Illinois.

Under "III" of respondent's brief, commencing on page 24 thereof, respondent says that the petitioner does not point out the important question presented.

It must be borne in mind that while the respondent throughout the trial of the case admitted that the matters and things that happened in the Probate Court were in fact immaterial as an element of damages (Rec. 184) referred to and quoted on pages 49 and 50 of petitioner's original brief herein, yet in the reviewing court she clearly switched her position and maintained that damage was proved by the denial of the claim in the Probate Court with which position the court of review erroneously concurred as appears from its opinion (Tr. 439). Petitioner then called attention to the fact that his pleadings as to what transpired in the Probate Court had been stricken as immaterial and that was the attitude of respondent and the court throughout the trial of the case as set forth at page 57 of petitioner's original brief herein on this point and therefore there was no attempt by petitioner to introduce any evidence as to what did transpire in the Probate Court in connection with the disallowance of respondent's claim therein, and the only evidence as to what transpired in the Probate Court was that introduced by respondent referred to in petitioner's original argument (pp. 57, 58) of this point which shows that such evidence was objected to.

Petitioner has pointed out in his original brief (page 54) that the statutes of the State of Illinois require that when a claim is objected to by the administratrix of the estate full proof thereof must be made by the claimant; and petitioner also pleaded in his answer, as shown in his prior brief, that the claim of respondent was not disallowed solely by reason of the release, and set forth in full the objections raised by the administratrix of the estate, thereby laying the foundation for establishing that the release was not the sole reason for the disallowance of said claim in the Probate Court.

The reviewing court, as was pointed out in the original discussion of this point, sustained the lower court in striking the answer of petitioner which set forth the various objections filed by the administratrix of the estate to the claim of respondent on the ground that the objections filed thereto were immaterial. Petitioner knows of no way by which it can be established that objections have been filed or defenses raised to a claim other than to show same by the pleadings filed. It certainly became material in this case for the respondent to establish that the release was the sole ground upon which her claim was denied in the Probate Court, if what happened in the Probate Court was at all material and could be construed as an element of damage. The pleadings of the representative of the estate, as has been shown, demanded strict proof of respondent of her claim against said estate.

Respondent cites *Andrews* v. *Votaw*, 240 Ill. App. 311 (page 23 of her brief), which clearly was intended to be applicable to Point III, for the purpose of contending that the court of review followed the Illinois law. An examination of that case, however, shows that the claim there was predicated on a negotiable note and that the representative of the estate, instead of disclaiming knowledge

and demanding strict proof, set forth an affirmative defense of payment; and, of course, in view of such a pleading, the court held that the burden of proof was upon the administrator of the estate to establish that affirmative defense. This position was very different from that taken by the administratrix of McConnell's estate.

Respondent also cites the case of *Ivanhoe* v. *Buda*, 247 Ill. App. 336, 341, as an authority in support of the action of the trial court and the reviewing court in holding that it was proper to strike that portion of petitioner's answer which set up the objections filed in the Probate Court to the allowance of respondent's claim therein. There is no question but what the ruling of the court in *Ivanhoe* v. *Buda* was correct. During the trial of that case there was an attempt to introduce certain documents issued by the Industrial Commission in connection with the hearing of the case before that Commission. The documents in question were not presented, however, for the purpose of showing that certain pleadings and issues had been raised before the Commission, but were attempted to be introduced for the purpose of establishing certain facts therein related. Clearly such documents were not the best evidence and were undoubtedly hearsay, and the decision in that case in no way supports the ruling of the trial court here in striking from this petitioner's answer the defenses raised in the Probate Court, as these defenses were included in petitioner's answer, not for the purpose of establishing that such were the facts, but for the purpose of establishing that certain defenses and objections had been raised, among others that strict proof was demanded of the plaintiff to establish her claim, and also for the purpose of laying the foundation for refuting the contention of respondent that her claim was disallowed and barred solely by reason of the interposition of the release.

The holding by the trial court and the reviewing court

that the objections filed to the claim of plaintiff by the administratrix of the estate were immaterial was contrary to the law of the State of Illinois to the effect that when objections are filed to a claim against an estate and strict proof demanded, that strict proof must be made by the claimant. And, therefore, as stated on page 59 of petitioner's brief in support of his petition, "the only deduction that one can make from the opinion of the reviewing court is that it determined, contrary to the statute of the State of Illinois governing the procedure for establishment of a claim in the Probate Court when same has been objected to, that it was not necessary to introduce evidence to prove the claim and that the filing of the claim in the Probate Court was of itself sufficient, even when the claim was objected to."

IV.

The opinion of the Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a manner probably in conflict with applicable local decisions in that it determined that when a case is predicated upon affirmative, fraudulent, deceitful representations it is not necessary that the same be proved by a clear preponderance of the evidence.

In reply to the above contention of the Petitioner set forth on page 60 of his brief, the Respondent on page 25 under IV quotes from the opinion of the reviewing court in this case 117 Fed. (2) 680. Petitioner had requested instructions as set forth on pages 61 and 62 of his brief herein, the same being Defendant's Requests VII (Tr. 347) and III (Tr. 344-345); these instructions the court refused to give and instead the court gave instructions, eliminating therefrom the part italicized in each instruc-

tion. Said instructions appear in the record (Instr. 21, Tr. 374) and (Instr. 12, Tr. 371). The instruction proposed and presented to the court before the final arguments by the Plaintiff and Defendant, appear on pages 338-349 of the record. Arguments were had on the instructions at that time, as appears on the top of page 350 of the record. It therefore clearly appears that the court was specifically requested to give the two instructions presented by the petitioner, and the court changed the instructions as indicated. How then can it be said by the Respondent that the trial court's attention was not properly and opportunely called to the fact that the instruction should be given as requested by the petitioner.

Respondent cites *The Merchants' National Bank* v. *Lyon,* 185 Ill. 343, 354. From an examination of this case it appears that the verdict of the jury was in favor of the defendant who was charged with fraud. The defendant did not ask for an instruction of the kind requested by this Defendant. It was clearly not necessary for him to do so, and no issue was made of the fact, and the court simply says on page 354:

> "Fraud being alleged, it must be established by a preponderance of the evidence."

The case of *Endsley* v. *Johns,* 120 Ill. 469, was a case predicated on fraud. The finding was in favor of the Plaintiff. There was no discussion whatever in the court's opinion as to the character of instruction that the defendant was entitled to in such a case in respect to whether or not the fraud or deceit must be proved by a clear preponderance of the evidence. The defendant did not raise that question or ask for such an instruction.

The case of *Miller* v. *Steele,* 153 Fed. 714, 721, was a case predicated on a contract for services rendered by one

member of a family to another member. On page 720, at 3 the court says:

> "* * * it is stated that the court was requested to give an instruction to the jury in relation to the character of the proof required to establish a liability for services rendered by one party to another while they are holding a family relation with each other."

The instruction requested was refused, and on page 721 the court discusses the fact that it was only necessary to prove the contract in question by a preponderance of the evidence. The case has no application to the case before the court, and secondly, it was not a case decided by an Illinois court or predicated on Illinois law.

The case of *Crane* v. *Schaefer,* 140 Ill. App. 647, was merely an Appellate Court case, and if it in any way supports the contention of Respondent, it is contrary to the holdings of the Supreme Court of the State of Illinois on the question of the proof required to establish fraud and deceit. However, an examination of that case shows the discussion was not predicated upon an instruction of the kind requested by the petitioner in this case, but was predicated on a request for an instruction by the Defendant that the fraud and deceit must be proved beyond a reasonable doubt.

The case of *Mortimer* v. *McMullen,* 202 Ill. 413, was one in which the plaintiff sought to foreclose a mortgage. The defendant pleaded the mortgage was obtained by fraud and deceit. The court on page 416 says:

> "If the evidence is admissible, as conducing in any degree to the proof of the fact, the only legal test, applicable to it upon such an issue (namely the issue of fraud) (our parenthesis) is its sufficiency to satisfy the mind and conscience, and produce a satisfactory conviction or belief. (*Carter* v. *Gunnels,* 67 Ill. 270) The proof, however, must be satisfactory. It must be so strong and cogent as to satisfy a man of sound

judgment of the truth of the allegation. (*Schroeder* v. *Walsh, supra*)

This case as a matter of fact definitely tends to support the position of the petitioner in respect to the instructions that the trial court should have given to the jury rather than the contention of the Respondent, and it is interesting to note that in that case as in the other cases, the court did not hold that in a case of the kind and character before this court, the defendant would not be entitled to an instruction of the kind requested by this defendant.

We again call attention to the case Petitioner cited in his original brief and to the fact that it is a much later case than any cited by the Respondent, and submit that the Petitioner has supported his contention that when a case is predicated upon affirmative, fraudulent, deceitful representations, it was necessary that the same be proved by a clear preponderance of the evidence, and that he was entitled to have the jury charged to that effect, and that the opinion of the Circuit Court of Appeals for the Seventh Circuit is contrary to the law of the State of Illinois in that respect.

CONCLUSION.

It is again respectfully submitted that this Honorable Court should grant the writ of certiorari prayed for in the petition for each and all the various reasons set forth in I to VII, inclusive, on page 13 of the petition for the writ, predicated on each and all the errors hereinbefore set forth in the argument, and further respectfully submits that the judgment of the Circuit Court of Appeals for the Seventh Circuit (Tr. 443) should be reversed, and that said cause should be certified to this the Supreme Court for determination by it with the same power and authority and like effect as if the cause had been brought there by unrestricted writ of error or appeal, irrespective of any matter or thing set forth in respondent's brief.

Respectfully submitted,

By CHARLES H. SOELKE,
Counsel for Petitioner.